APPLICATION OF THE PRINCIPLES OF THE RIGHT TO ORGANISE AND TO BARGAIN COLLECTIVELY

Fourth Item on the Agenda
# CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>INTRODUCTION</strong></td>
<td>1</td>
</tr>
<tr>
<td><strong>CHAPTER I</strong>: Proceedings of the 31st Session of the Conference</td>
<td></td>
</tr>
<tr>
<td>concerning the Application of the Principles of the Right to</td>
<td>4</td>
</tr>
<tr>
<td>Organise and to Bargain Collectively</td>
<td></td>
</tr>
<tr>
<td>Extracts from the Report of the Conference Committee</td>
<td>4</td>
</tr>
<tr>
<td>Discussion in the Plenary Sitting of the Conference</td>
<td>14</td>
</tr>
<tr>
<td><strong>CHAPTER II</strong>: Proposed Text</td>
<td>15</td>
</tr>
<tr>
<td>Proposed International Instrument concerning the Application of the</td>
<td></td>
</tr>
<tr>
<td>Principles of the Right to Organise and to Bargain Collectively</td>
<td>15</td>
</tr>
</tbody>
</table>
INTRODUCTION

The International Labour Conference, at its 31st Session (San Francisco, June-July 1948), had before it for consideration the following questions relating to freedom of association and industrial relations:

(1) the question of freedom of association and protection of the right to organise, with a view to the adoption of an international Convention;

(2) the question of the possible establishment of international machinery for safeguarding freedom of association;

(3) the question of industrial relations, comprising the following points: application of the principles of the right to organise and to bargain collectively, collective agreements, conciliation and arbitration, and co-operation between public authorities and employers' and workers' organisations.

At the close of its discussions the Conference took the following decisions:

1. It adopted a Convention concerning freedom of association and protection of the right to organise.

2. It adopted a Resolution concerning international machinery for safeguarding freedom of association. By this

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5 Ibid., No. 31.
Resolution, the Conference, having taken note of the report presented by the Governing Body in conformity with the Resolution adopted at its 30th Session, requested the Governing Body to enter into consultations with the competent organs of the United Nations, for the purpose of examining what developments to existing international machinery may be necessary to ensure the safeguarding of freedom of association, and to report back to the Conference at an early session.

3. It adopted certain conclusions relating to the question of the application of the principles of the right to organise and to bargain collectively, and decided to place this question on the agenda of the 32nd Session of the Conference with a view to final decision.

4. The Conference also decided to place on the agenda of its next general session for a first discussion an item dealing with industrial relations comprising collective agreements, conciliation and arbitration, and co-operation between public authorities and employers' and workers' organisations.

It is only with the third of the questions referred to above that the present report is concerned.

In accordance with paragraph 6 of Article 37 of the Standing Orders of the Conference, the Office is required to prepare one or more texts of Conventions or Recommendations and to communicate them to the Governments so as to reach them not later than two months from the closing of the session of the Conference, asking them to state within three months whether they have any amendments to suggest or comments to make.

The purpose of the present report is to transmit these texts to the Governments in order that they may forward their amendments and comments. These texts are based, on the one hand, on the replies of the Governments to the questionnaire circulated to them in preparation for the first discussion and, on the other hand, on the conclusions adopted by the Conference at its 31st Session.

In order that it may be able to conform to the time limits laid down under the Standing Orders of the Conference, the Office urgently requests Governments to communicate their amendments or comments on the texts submitted to them as early as possible, and in any event so that they may reach the Office by 11 December 1948 at the latest. It also suggests that those Governments which have no amendments to suggest or
comments to make might inform the Office, before 11 December 1948, whether they consider that the proposed drafts constitute an adequate basis for discussion at the 32nd Session of the Conference. Governments are requested to address their replies to the International Labour Office, Geneva, Switzerland.
CHAPTER I

PROCEEDINGS OF THE 31st SESSION OF THE CONFERENCE CONCERNING THE APPLICATION OF THE PRINCIPLES OF THE RIGHT TO ORGANISE AND TO BARGAIN COLLECTIVELY

Extracts from the Report of the Conference Committee

The Committee on Freedom of Association and Industrial Relations consisted of 80 members (40 Government members, 20 Employers' members and 20 Workers' members). In addition to the questions concerning (a) freedom of association and protection of the right to organise, and (b) the possible establishment of international machinery for safeguarding freedom of association, the Committee had to consider, under the general title of "industrial relations", the following questions: application of the principles of the right to organise and to bargain collectively; collective agreements; conciliation and arbitration; co-operation between public authorities and employers' and workers' organisations.

When submitting its conclusions, the Committee emphasised that, owing to lack of time, it had found it impossible to study the whole of these problems. It therefore limited itself to the examination of the problem of the application of the principles of the right to organise and to bargain collectively, and proposed that consideration of the other three questions should be referred to the next general session of the Conference for a first discussion.

The Committee took as the basis for discussion the proposed conclusions concerning the application of the principles of the right to organise and to bargain collectively proposed by the Office, and decided to hold a general discussion on this question.

The Employers' members observed that freedom of association should be guaranteed in its negative aspect—freedom not to join—as well as in the positive aspect—freedom to
establish organisations and to join them. In their opinion, the form of the international regulations should be left to be determined by the next session of the Conference. The regulations should state clearly that no employer or worker should be forced to join an industrial organisation against his will. Such coercion would be contrary to the principles stated in the Convention concerning freedom of association. Consequently, Governments should take a clear decision, first, whether they intended to limit the freedom of an individual to refrain from joining any particular organisation, and secondly, whether they intended to impose on the interested parties the obligation to bargain collectively, or whether they would limit all intervention to the simple fact of facilitating the conclusion of collective agreements.

Moreover, several Employers’ members emphasised the point that not only should the international regulations expressly guarantee the liberty not to join, but they should also fully safeguard freedom of expression and provide clearly that no compulsion to organise could be exercised in regard to either workers or employers.

In the opinion of the Mexican Government member, the freedom not to join, while constituting an aspect of individual liberty, should not be specially guaranteed by international regulations.

The United Kingdom Government member pointed out that the Employers’ proposed addition to the list of points would raise several difficult issues of vital importance to Governments, no less than to workers and employers. If the intention was to give protection by law, or by direct State action, to an individual’s right not to join any organisation, it seemed to follow that collective agreements providing for the closed or union shop would have to be made illegal. He asked whether the effect of the amendment would be to require all strikes to be made illegal where union members refused to work with other workers who were not prepared to join a union. If so, few Governments could accept a Convention which required States to take any such action.

The Workers’ members pointed out that the right to organise and the right not to organise could not be placed on a footing of equality, and therefore, opposed any inclusion in the international regulations of a clause specially guaranteeing the right not to join. The international regulations, as emphasised by
the French Workers’ member, were intended primarily to make the principle of freedom of association effective by guaranteeing to those concerned the right to establish organisations freely and allowing them to function freely, an essential condition of collective bargaining.

After the general discussion, the Committee proceeded to the examination of the proposed conclusions.

I

Proposed Form of the International Regulations

The Office text was as follows:

1. International regulations concerning the application of the principles of the right to organise and to bargain collectively to be adopted in the form of a Convention.

The Committee decided to postpone until next year the decision on the question whether the international regulations should take the form of a Convention or a Recommendation, and also decided that the Governments should be consulted on this question.

II

Proposed Conclusions relating to a Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively

I. GUARANTEE OF THE WORKERS’ RIGHT TO ORGANISE

The Office text was as follows:

2. The workers to be accorded adequate protection against all acts of anti-union discrimination in respect of their employment and especially against acts designed to—
   (a) make the employment of a worker depend on the condition that he shall not join a union or shall withdraw from one to which he belongs;
   (b) prejudice a worker by reason of his membership of a union or his union activities;
cause the dismissal of a worker by reason of his membership of a union or his union activities.

The United Kingdom Employers' member pointed out that the term "union activities" lacked clarity. In fact, he declared, any activity which contravened legal provisions, stipulations of collective agreements or the requirements of works regulations, could not enjoy legal protection.

After discussion, the Committee agreed on the following text:

2. The workers to be accorded adequate protection against any acts of anti-union discrimination in respect of their employment and especially against acts designed to—

(a) make the employment of a worker dependent on the condition that he shall not join a union or shall withdraw from one to which he belongs;

(b) cause the dismissal of or otherwise prejudice a worker by reason of his membership in a union or because of his participation in union activities, outside working hours or with the consent of his employer within working hours.

II. PROTECTION OF WORKERS' ORGANISATIONS

The Office text was as follows:

3. (a) Workers' organisations to be accorded adequate protection against all acts of interference, on the part of employers, employers' organisations or their agents, in their establishment, functioning or administration.

(b) Acts also to be deemed to constitute wrongful interference which are designed to—

(i) effect the establishment of workers' organisations under the domination of employers;

(ii) support workers' organisations by financial or other means with the object of placing such organisations under the control of employers.

The South African Government member proposed the deletion of paragraph (b) of this provision. Although agreeing with the principle stated in this provision, he was of the opinion that, when it came to its practical application, the Governments might be embarrassed if there was more than one union claiming to be representative of the workers concerned and to be fully independent of the employer. In his opinion Governments would have difficulty in implementing such a provision without contravening the terms of the Convention concerning freedom of association.
The Committee rejected this amendment by 52 votes to 3 and adopted the following text:

3.  (a) Workers' organisations to be accorded adequate protection against any acts of interference on the part of employers, employers' organisations or their agents, in their establishment, functioning or administration.

   (b) In particular, acts which are designed to—

   (i) effect the establishment of workers' organisations under the domination of employers;

   (ii) support workers' organisations by financial or other means with the object of placing such organisations under the control of employers,

shall be deemed to constitute wrongful interference.

III. ACTS OF WRONGFUL COERCION

The Office text was as follows:

4. Employers and workers to be accorded adequate protection against all acts of wrongful coercion—such as assault and violence—designed to interfere with the free exercise of their right to organise.

The Committee rejected by 98 votes to 3 an amendment proposed by the Polish Government member to delete the word "employers".

The Employers' members proposed to add the following words to this text:

including their right to join or not to join employers' and workers' organisations.

The Workers' members opposed this amendment for the reasons given in the course of the general discussion referred to above, and proposed the deletion of the whole of paragraph 4.

During the discussion, reference was made to the passages on page 88 of the report on freedom of association and protection of the right to organise (Report VII) wherein it is stated, in particular:

It should be observed in this connection that the very object of the international regulation is to guarantee freedom of association as a measure of social protection of outstanding importance. But the protection of the purely negative right not to associate could naturally not be viewed as coming under this head.

Moreover, Article 2 merely lays down a right and not, as certain countries seem to fear, an obligation. It follows, therefore, that workers and employers remain completely free either to make use
of this right or not to do so. But the voluntary renunciation of the positive right to associate could not be treated on the same basis as the formal guarantee of the purely negative right not to associate.

Several Workers' members stressed the point that any recognition of the right not to join would encourage certain employers to oppose trade unions, and would be contrary to the rights granted to the workers who, in several countries, by virtue of the national Constitution, enjoyed full and complete freedom of association as well as the right to provide the "closed shop" clause in collective agreements.

However, there was wide support for the view that nothing in the Convention already adopted or in the conclusions then under discussion could deprive a worker or an employer of his inherent freedom not to exercise his right of association if he so decided.

In accepting this view, the Workers' members emphasised the fact that it did not in any way limit the freedom of the unions to work for 100 per cent. union membership. The Employers' members declared that they did not dispute this right of the workers' organisations and, in the light of the various statements made in the discussion, withdrew their amendment. The Committee decided to delete such terms as "assault and violence" and adopted the text in the following form:

4. Employers and workers to be accorded adequate protection against acts of wrongful coercion designed to interfere with the free exercise of their right to organise.

IV. UNION SECURITY CLAUSES

The Office text was as follows:

5. Provisions in national regulations requiring membership of a union as a previous condition to employment or as a condition to maintenance in employment not to be covered by this Convention.

After discussion, the Committee agreed to delete this provision without prejudice to any future action, it being understood that the question of union security, if thought necessary, could be raised again at a subsequent session of the Conference.
V. GUARANTEE OF THE PRINCIPLE OF COLLECTIVE BARGAINING

The Office text was as follows:

6. Appropriate measures to be taken to bring about negotiations between employers and employers' organisations on the one hand, and workers' organisations on the other, with a view to regulating conditions of employment by means of collective agreements.

The discussion centred around the phrasing of this text. It was suggested in particular to substitute for the words "bring about" in the English text the word "induce", in conformity with the French and Spanish texts. In the opinion of the Employers' members and of several Government members, the provision should not be capable of being interpreted in a manner suggesting an obligation for the State to intervene to compel collective negotiations.

The Netherlands Government member felt that the introductory words of the paragraph created an impression that national authority could not abstain from taking some measures in all circumstances. There might be circumstances in which it would be both undesirable and inappropriate for a Government to intervene, and, whatever provision was finally adopted next year, it should ensure to Governments freedom of action in such circumstances.

It was understood that it was the duty of the Conference, when it examined the proposed Convention or Recommendation at its next session, to decide the definite form of these provisions.

The Committee unanimously adopted the text as follows, and it becomes paragraph 5 of the Committee's conclusions:

5. Appropriate measures to be taken to induce employers and employers' organisations on the one hand, and workers' organisations on the other, to enter into negotiations with a view to regulating conditions of employment by means of collective agreements.

VI. SUPERVISORY MEASURES

The Office text was as follows:

7. Appropriate machinery to be established, if necessary, for the purpose of ensuring respect for the right to organise and to bargain collectively as defined in paragraphs 2, 3, 4, 5 and 6 above.
The Committee unanimously adopted the text in the following form, and it becomes paragraph 6 of the Committee's conclusions:

6. Appropriate machinery to be established, where necessary, for the purpose of ensuring respect for the right to organise and to bargain collectively as defined in paragraphs 2, 3, 4 and 5 above.

It should also be observed that the Swedish Government member submitted an amendment proposing to add a new provision reading as follows:

Provisions in collective agreements or other contracts, infringing the right to organise and to bargain collectively as defined in paragraphs 2, 3, 4 and 5 above shall be null and void except as to provisions requiring that an employee who directs, distributes or supervises work in which he himself does not take part otherwise than incidentally, shall not be a member of the same union as the workers subordinate to him, provided however that efficient organisations for furthering and defending the interests of such employees exist.

After discussion the amendment was withdrawn by its mover, it being understood that the question of the scope of the international regulations might be examined at the next session of the International Labour Conference, and, in that connection, the Conference could examine the case of workers who directed, distributed or supervised work in which they took part only incidentally. Moreover, the Swedish Government could consult with the Office as to the desirability of having this point considered in the documentation for the Conference.

The Committee unanimously adopted the whole of the proposed conclusions relating to the application of the principles of the right to organise and to bargain collectively, and also a proposed resolution concerning the placing of this question on the agenda of the next session of the Conference. These texts are set forth in the Appendices.

APPENDIX I

PROPOSED CONCLUSIONS

Proposed Form of the International Regulations

1. International regulations concerning the application of the principles of the right to organise and to bargain collectively to be adopted in the form of a Convention or a Recommendation.
Guarantee of the Workers' Right to Organise

2. The workers to be accorded adequate protection against any acts of anti-union discrimination in respect of their employment and especially against acts designed to—

(a) make the employment of a worker dependent on the condition that he shall not join a union or shall withdraw from one to which he belongs;

(b) cause the dismissal of or otherwise prejudice a worker by reason of his membership in a union or because of his participation in union activities, outside working hours or with the consent of his employer within working hours.

Protection of Workers' Organisations

3. (a) Workers' organisations to be accorded adequate protection against any acts of interference, on the part of employers, employers' organisations or their agents, in their establishment, functioning or administration.

(b) In particular acts which are designed to:

(i) effect the establishment of workers' organisations under the domination of employers;

(ii) support workers' organisations by financial or other means with the object of placing such organisations under the control of employers,

shall be deemed to constitute wrongful interference.

Acts of Wrongful Coercion

4. Employers and workers to be accorded adequate protection against acts of wrongful coercion designed to interfere with the free exercise of their right to organise.

Guarantee of the Principle of Collective Bargaining

5. Appropriate measures to be taken to induce employers and employers' organisations on the one hand, and workers' organisations on the other, to enter into negotiations with a view to regulating conditions of employment by means of collective agreements.
Supervisory Measures

6. Appropriate machinery to be established, where necessary, for the purpose of ensuring respect for the right to organise and to bargain collectively as defined in paragraphs 2, 3, 4 and 5 above.

Appendix II

Proposed Resolution Concerning the Agenda of the Next Session of the Conference

The Conference,

Having before it the eighth item of its agenda, consisting of the following points: application of the principles of the right to organise and to bargain collectively, collective agreements, conciliation and arbitration, and co-operation between public authorities and employers' and workers' organisations;

Having realised that it was materially impossible to study the whole of this item during its next session;

Having decided consequently to limit its deliberations to the question of the application of the principles of the right to organise and to bargain collectively;

Having approved the report of the Committee appointed to consider the eighth item on its agenda:

Decides:

1. To put on the agenda of its next general session the question of the application of the principles of the right to organise and to bargain collectively with a view to the adoption of a Convention or a Recommendation at that session;

2. To put on the agenda of its next general session for a first discussion an item dealing with industrial relations comprising collective agreements, conciliation and arbitration, and co-operation between public authorities and employers' and workers' organisations.
Discussion in the Plenary Sitting of the Conference

The report of the Committee analysed above was submitted to the Conference at its sitting on 10 July 1948.

Mr. Cornil, Belgian Employers' member, presented the report on behalf of the three Reporters of the Committee. He emphasised the point that the three groups represented on the Committee had made concessions in order to reach an agreement which might serve as a basis for future discussion by the Conference when it would be called upon, at its next session, to take a final decision.

The Conference adopted the report of the Committee without discussion.

It also adopted, by 117 votes to 0, the Resolution concerning the placing of the question of the application of the principles of the right to organise and to bargain collectively on the agenda of the 32nd Session of the Conference.
CHAPTER II

PROPOSED TEXT

The following pages contain the text of a proposed international instrument concerning the application of the principles of the right to organise and to bargain collectively.

In accordance with paragraph 6 of Article 37 of the Standing Orders of the Conference, Governments are requested to inform the International Labour Office, Geneva, not later than 11 December 1948, whether they have any amendments to suggest or comments to make.

Proposed International Instrument concerning the Application of the Principles of the Right to Organise and to Bargain Collectively

Reference has already been made to the fact that the Conference deferred until its 32nd Session the question of taking a decision as to the form which the international regulations should finally assume.

In order that the next Conference may reach a decision with full knowledge of the circumstances, Governments are requested to give a clear indication of their preference, either (a) for a Convention, or (b) for a Recommendation, or (c) for a Convention supplemented by a Recommendation.

Pending the arrival from the Governments of the replies which would enable the Office to prepare proposed texts in final form, the proposed international instrument appended to this Chapter does not include the usual preamble, because the preamble to a Convention is different from that to a Recommendation. Nor does the proposed instrument include the usual clauses relating to non-metropolitan territories, because such clauses may be inserted in a Convention but not in a Recommendation. Lastly, the various articles of the proposed text include
both the mandatory formula appropriate to a Convention and the non-mandatory formula proper to a Recommendation.

The actual text of the proposed instrument calls for little remark. Articles 1, 2, 3, 4, and 5 follow closely the conclusions unanimously adopted by the Conference at its 31st Session.

For reasons of clarity, it has nevertheless appeared desirable to divide Article 1 into two paragraphs. The first paragraph expresses the principle that workers should be accorded adequate protection against any acts of anti-union discrimination in respect of their employment. In accordance with the text adopted by the Conference, the second paragraph defines, more particularly, certain kinds of acts of anti-union discrimination.

Article 6 of the proposed text is a new one, intended to define the scope of the regulations. As mentioned above, the Committee expressed the opinion that the question of the scope of the regulations might be considered at the next Session of the Conference. It may also be observed, in this connection, that several Governments had already indicated the same view when making their replies to the Office questionnaire.

According to the terminology of the new article, the regulations would not apply to officials in the service of public administrations. In fact, it is by reason of the contractual relationship which is or may be entered into by wage-earners and employers that one party or the other might be exposed to certain discriminatory acts against which the international regulations are intended to protect them. This is not the case with regard to officials, who benefit in all countries from conditions of employment prescribed by statute, which protects them from such interference. On the other hand, protection should be extended to all categories of persons who have entered or may enter into a contractual relationship, whatever the nature of their calling may be.

In its report to the Conference, the Committee drew attention to the case of wage-earners who direct, supervise or distribute the work and who, accordingly, are not members of the same unions as the workers under their orders. It should be stressed, in this connection, that the international regulations are not intended to decide the question as to whether it is preferable for persons who direct the work, supervisors or foremen, should or should not join the same unions as the workers under their control. They provide simply that all persons who are or may
be bound by a private contract of employment shall enjoy the guarantees accorded by the international regulations.

The proposed text suggested by the Office, in accordance with the decision of the Conference, no longer includes a special clause relating to union security. With regard to this point, it must be emphasised, however, that the Committee on Freedom of Association and Industrial Relations in no way intended to prejudge the future action of the Conference in this connection.

Lastly, it should be pointed out that some countries, by virtue, for example, of agreements freely concluded between employers' and workers' organisations, possess a system of industrial relations which offers guarantees at least equal to those prescribed under the proposed international regulations. It would seem desirable to point out that the terminology of the various articles of the proposed international instrument has been drafted in a form sufficiently flexible to enable such countries to adhere thereto without being obliged beforehand to adopt special measures for that purpose.

PROPOSED INTERNATIONAL INSTRUMENT CONCERNING THE APPLICATION OF THE PRINCIPLES OF THE RIGHT TO ORGANISE AND TO BARGAIN COLLECTIVELY

Article 1

1. Workers shall (should) be accorded adequate protection against acts of anti-union discrimination in respect of their employment.

2. Such protection shall (should) be accorded, more particularly, against acts calculated to—

(a) make the employment of a worker subject to the condition that he shall not join a union or shall withdraw from a union to which he belongs;

(b) cause the dismissal of or otherwise prejudice a worker by reason of his membership in a union or because of his participation in union activities outside working hours or, with the consent of his employer, within working hours.

Article 2

1. Workers' organisations shall (should) be accorded adequate protection against any acts of interference on the part of employers, employers' organisations or their agents, in their establishment, functioning or administration.
2. In particular, acts which are designed to promote the establishment of workers' organisations under the domination of employers, or to support workers' organisations by financial or other means, with the object of placing such organisations under the control of employers, shall be deemed to constitute wrongful interference.

Article 3

Workers and employers shall (should) be accorded adequate protection against acts of wrongful coercion which would interfere with the free exercise of their right to organise.

Article 4

Appropriate measures shall (should) be taken to induce employers and employers' organisations on the one hand, and workers' organisations on the other, to enter into negotiations with a view to regulating conditions of employment by means of collective agreements.

Article 5

Appropriate machinery shall (should) be established, where necessary, for the purpose of ensuring respect for the right to organise and to bargain collectively as defined in the preceding articles.

Article 6

The provisions of the preceding articles do not apply to officials in the service of public administrations.