

INTERNATIONAL LABOUR
CONFERENCE

SEVENTY-SEVENTH SESSION
GENEVA, 1990

RECORD OF PROCEEDINGS

INTERNATIONAL LABOUR OFFICE
GENEVA



22. The Employers' members considered that the Committee of Experts' response was to say, in substance, that such competence rested solely with either the International Court of Justice or itself, and no one else. While they did not take a position here with respect to the outcome of the representation or commission of inquiry procedures, they did feel that the opinion of the Committee of Experts that its evaluations are binding unless corrected by the International Court of Justice, could not be correct. One obvious reason was that, if this were the case, the present Committee would lose its fundamental purpose, and so would the Conference. A legal reason was that this was contradicted by the ILO Constitution and by the Standing Orders of the Conference concerning the submission of governments' reports and the terms of reference of the Conference Committee, which had an independent competence to examine reports. The Employers' members had generally followed the Experts' views in the past and would continue to do so in the future, because there was good reason for doing so. However, they felt entitled to depart from this practice in particular cases.

23. In this connection, the Employers' members recalled that they had a different interpretation from the Experts, for instance on the question of the right to strike. Although this question was not expressly settled by any Convention or Recommendation (except the very special case dealt with in the Voluntary Conciliation and Arbitration Recommendation, 1951 (No. 92)), the Experts had progressively deduced from Convention No. 87 a right to strike which was hardly limited. The Employers' members could not accept this, not only because they considered the Experts' opinion questionable in law but also because the issue touched directly on employers' interests.

24. Paragraph 7 of the Committee of Experts' report posed a second question, which was the methods and criteria used by the Experts to determine the content and meaning of standards. Only the principles of interpretation laid down in Articles 31 *et seq.* of the Vienna Convention on the Law of Treaties could be taken into consideration here. The general rules of interpretation which must be applied in the first place included, besides the ordinary meaning of the terms used, the object and intent of a provision, and any subsequent practice in the application of the Convention by the parties (Article 31, paragraph 3 (b), of the Convention). As concerned the right to strike, the Employers' members found that the Committee of Experts had taken a position under which this right was almost unlimited, though this was not the practice followed by any State. The annual reports of the Committee of Experts showed clearly that the bases and substantive regulations of the right to strike, and in particular its limitations, differed in virtually all countries. Nevertheless, the Committee of Experts had given a very narrow interpretation of the acceptable legal limits on this right, which had resulted in an enormous gap between the practical application of Convention No. 87 by member States and its interpretation by the Committee of Experts. This interpretation could not be correct according to the above-mentioned rule of Article 31 of the Vienna Convention, which refers to the practice followed in the application of a treaty which establishes the agreement of the parties regarding its interpretation.

Such a common conviction had not become known, however; in reality it did not exist. The Employers' members would await with interest the reply of the Committee of Experts to their arguments.

25. Two other Employer members (Sweden and Turkey) intervened along the same lines. The Employer member of Sweden took the occasion to dispel some misunderstandings over his intervention at the previous session of the Conference. His reference to a few cases in which the Committee of Experts had, in his opinion, overinterpreted Conventions had been meant to be constructive, and not to call into question the independence, objectivity and impartiality of the Experts. He could not, however, bestow on the Experts a certificate of infallibility, as they had requested. The Committee of Experts had likened itself to a Commission of Inquiry established by the Governing Body under article 26 of the Constitution, whose interpretation of an individual case would stand unless appealed to the International Court of Justice. The Employer member of Sweden considered this analogy to be false. The Constitution provided for an annual review by the Conference itself of reports due from governments concerning the application of ratified Conventions. It further permitted complaints and representations concerning the non-observance by a particular government of a Convention which it had ratified to be submitted to the Governing Body. The Governing Body could appoint a Commission of Inquiry, but was not required to do so. Article 37 of the Constitution, conferring on the International Court of Justice the exclusive competence for giving definitive interpretations of Conventions, should be read in conjunction with article IX of the agreement between the United Nations and the ILO, under which only the Conference or the Governing Body was allowed to request such interpretations. The only exception to this rule related to the Commission of Inquiry procedure and to the right of governments to lodge an appeal with the Court. The Constitution did not mention the Committee of Experts. That Committee, which had been established by the Governing Body in 1926 to assist the Conference in the annual review of application reports, did not take precedence over the Conference nor over the Governing Body. However, the reports of the Committee of Experts had acquired a great moral authority over the years, and the Conference relied mainly on them to carry out its own work. It had happened and would continue to happen – but not often – that a member of the present Committee would consider that the Committee of Experts had overinterpreted a Convention. Such observations should be accepted in good faith by the Experts. Like the International Court of Justice and all the ILO bodies which interpret Conventions, the Experts should abide by the general principles of the Vienna Convention, since the objective of these principles was to ensure uniform interpretation of international treaties whatever the economic and social conditions existing in a given country. The Employers' member of Turkey stated that granting definitive authority to the views of the Committee of Experts would be contrary to the Standing Orders of the Conference which provided for the Committee on the Application of Standards under article 7. The Committee of Experts was a consultative body which assisted the present Committee without binding it.