

INTERNATIONAL LABOUR
CONFERENCE

EIGHTY-FIRST SESSION
GENEVA, 1994

RECORD OF PROCEEDINGS

INTERNATIONAL LABOUR OFFICE
GENEVA

commitments. He agreed with the Workers' members that the European Union should not damage national tripartite consultations or try to establish a second code of international labour standards sometimes inferior to existing standards. The ILO should not on the other hand be unduly afraid of the development of regional cooperation, since it could have a favourable economic effect. Social dialogue should be realized at the level of the Union and effective consultations should be provided for at that level in order to improve cooperation.

81. The representative of the Secretary-General replied to various Committee members' questions as to the ratification of Conventions by the European Union and reassured the Committee that there was no conflict between the ILO and the European Commission Secretariat. The Office had always been available to supply information or assistance as required, and the ILO's member States which have ratified Conventions should be informed by the Commission of any implications of a draft directive on the application of ILO Conventions. If the Commission did not do that, the ILO would do so as far as possible by way of information and without any ulterior motive.

C. Reports requested under article 19 of the ILO Constitution

Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87); the Right to Organize and Collective Bargaining Convention, 1949 (No. 98)

82. The Committee held a fruitful and in-depth discussion on the General Survey of the Committee of Experts which examined the effect given to 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). Besides the information provided in the reports communicated under article 19 of the Constitution, the Committee of Experts also examined the information received under article 22 of the Constitution from member States having ratified the Conventions in question. The survey also took due account of the comments received from employers' and workers' organizations to whom government reports had been transmitted by virtue of article 23(2) of the Constitution.

General remarks

83. The Committee members unanimously welcomed the choice of Conventions Nos. 87 and 98 for the 1994 General Survey, particularly given that this year represented a double anniversary of special importance to the ILO. The principles of freedom of association, consecrated in the ILO Constitution and the Declaration of Philadelphia, along with tripartism, were the cornerstones of the ILO's action and its policies. These instruments were among the most ratified and, as further proof of their importance, even member States which had not ratified them could be called to explain before the Committee specially established to this end by the Governing Body of the ILO. For the Workers' members and several Government members (Finland, Germany, Netherlands), the fundamental principles contained in these Conventions were the prerequisites to the establishment of any appropriate machinery for industrial relations. The

Government members of South Africa and of Guinea stated, in particular, that these Conventions constituted the primary source of inspiration in the elaboration of their legislation in this area.

84. The Workers' members and the great majority of the Government members emphasized the independence, objectivity and impartiality demonstrated by the Committee of Experts in the elaboration of this General Survey which extended and, in many ways, completed the previous General Surveys on the subject. They expressed their conviction that, due to its high quality and exhaustive nature, this General Survey would serve as a reference text for several years to come, whether it be to promote the ratification of the Conventions or to improve their application, or even with respect to training activities. The Workers' members noted with satisfaction that, even if the two Committees had different mandates and working methods, the Experts had taken into account the work of this Committee, as they clearly stated that they had endeavoured to respond to certain questions and concerns which it had previously expressed. The Government member of Venezuela associated himself with these remarks.

85. The Employers' members, while subscribing to most of the comments of the Committee of Experts, expressed a certain number of reservations, in particular with respect to the chapter on the right to strike. Without calling into question the General Survey, the Government members of Belarus and of Portugal also expressed several nuances with respect to this question.

86. A wide consensus emerged in the Committee on the need for the universal application of standards on freedom of association, the respect of which could not be subordinated to the achievement of a certain level of development or to a political or economic situation. The Government member of Namibia emphasized in this regard, however, the dilemma faced by countries who had to yield to the requirements of international financial institutions and donor countries, which often were not easily reconcilable, and were even incompatible, with international labour standards; for example, when an economic recovery and structural adjustment plan — and the obtaining of financing — resulted in massive dismissal in the public service and drastic cut-backs in education and health services. In these circumstances, the question of free collective bargaining and the application of standards did not even come into question.

87. The Workers' members and several Government members emphasized that the survey was rightly placed within the context of the recent political and economic changes which had occurred. As regards political upheaval, while it may be true that important progress had been noted in the process of democratization, the Workers' members nevertheless recalled that there were still autocratic regimes in the world in which the only democratic thing was the name; one had to remain vigilant, therefore, because free and democratic workers' and employers' organizations made up an essential component of any true democracy. As concerned the new challenges raised by the globalization of the economy and the intensification of competition, the Workers' members considered that an updating was required by a strengthening of the functioning and the impact of the ILO as well as the fundamental principles being attacked. The survey satisfactorily responded to this need. In the opinion of the Employers' member of

the United States, however, some passages of the survey gave the impression that the Committee of Experts considered that Conventions Nos. 87 and 98 would in some way be protected from the upheavals occurring in the world of work, whereas the implementation of ILO standards could not be disassociated from national and global economic realities; just like the employers, the workers had to adapt to the changing conditions. While acquiescing to the need to adapt, the Workers' members could not accept that this would result in a weakening of their organizations and the collective bargaining systems developed over the years.

88. The General Survey noted a significant number of cases of progress achieved in the application of these conventions, which was highlighted by several Government members, as well as the Employers' and Workers' members. The latter recalled, however, that many serious problems of practical application, in fact as in law, existed in several parts of the world, as could be seen by the Reports of the Committee on Freedom of Association. Several Workers' members stressed the particularly serious situation prevailing in Latin America in this regard. The Workers' members of Colombia and of Guatemala recalled that the progress noted at the legislative level was not sufficient if not accompanied by a true political will to translate the spirit of the law into practice. Furthermore, the Workers' members and, in particular, the Workers' member of New Zealand mentioned that the recent adoption of the Contracts of Employment Act gave rise to serious violations of freedom of association and of free collective bargaining.

89. The Employers' members and several speakers from the two other groups recalled that the Committee of Experts' comments on the principles of freedom of association applied both to workers and employers. The latter would, therefore, have hoped that this equality of treatment had been mentioned more systematically in the survey. Furthermore, employers' organizations needed massive assistance with respect to training, particularly in the countries of Central and Eastern Europe where they had not previously been in a position to play their true role. The ILO could make an important contribution in this regard. The Workers' member of France, indicating his agreement on this last point if it was a question of finding interlocutors for trade unions, nevertheless specified that the ILO should never finance activities which would hinder the formation of workers' organizations or lead to their disappearance.

90. The Workers' members expressed great interest in the measures that the new Government of South Africa indicated it would take to follow the recommendations made by the Fact-Finding and Conciliation Commission, particularly with respect to freedom of association. The Government member of South Africa stated that his Government recognized without reservation the jurisdiction of the Fact-Finding and Conciliation Commission and its obligations under international law, and undertook to bring its laws into line with them. The public and agricultural sectors were now covered by labour legislation and a draft Bill concerning the so-called autonomous territories should be adopted shortly: then all of the country would be covered by a single industrial relations scheme. A process of tripartite consultation had begun with respect to the right to strike, an issue which might be resolved between now and next year.

91. The Workers' members expressed their complete agreement with the views of the Committee of Experts on the subject of a *world social platform*. This would be the first step towards the setting up of a truly human work scheme in all nations, an objective mentioned since 1919 in the ILO Constitution. Indicating that his Government did not yet have a definitive position on the advantages of including a social clause in international trade agreements, the Government member of the Netherlands expressed his opinion that the Conventions on freedom of association could play a role in this regard if such clauses were to be included. The Employers' member of the United States on the other hand felt that the extensive interpretation given by the Experts to these Conventions, as illustrated by the right to strike, represented one of the obstacles in their use in a social clause. He considered that the principle of freedom of association should be greatly simplified, perhaps to one sentence, to be implemented in any meaningful way in a trade regime. The Workers' members said that they had some difficulty reconciling this last argument with the fact that the Employers' members had really only criticized the chapter dealing with the right to strike, restricting themselves only to some reservations in respect of specific aspects. In these circumstances, reducing the principles of the Convention to one single sentence in a social clause would be a far too simplistic approach.

92. The Employers' member of the United States, supporting the observations made by the Employers' members, recalled the degree to which it was important that the observations of the Experts on the meaning and scope of Conventions Nos. 87 and 98 were well understood and accepted, precisely because of the central nature of these instruments to the work of this Committee. As everyone knows, this Committee functions for the most part on the basis of consensus. However, this ability is seriously impaired when one or the other group disagrees with the Experts' observations. This is particularly critical with respect to the formulation of conclusions on specific cases and the adoption of special paragraphs. This need for consensus is particularly acute in cases involving freedom of association. For the most part, this has not proven to be a problem except when the issue involves the right to strike.

General introduction of the General Survey

93. The Employers' members recalled the conditions which prevailed at the beginning of the industrial era, when democracy was still in its infancy in a number of countries; various groups had to struggle then to defend workers' and employers' interests. Even if there had been a considerable evolution since then, some forms, even the terminology used, had been conserved. It might therefore be useful to carry out a re-examination of this question. The General Survey set forth the diverse sources of rights which had emerged over the years and the different international instruments which contained various provisions on the question of freedom of association. The existing texts in the area, however, only contained brief principles on the subject. It was therefore not surprising that the introductory chapter of the survey did not really address the content of the standards in question, but rather confined itself to an assessment of how these standards had been interpreted and applied over the years by the different

supervisory bodies called to handle them. This sometimes gave the impression that one of these bodies was being called upon to lay down the law. Of course this was not said directly, because none of these bodies had that competence. The survey drew a number of conclusions, not only on a series of fundamental principles, considered by the Committee as a veritable international law of freedom of association, but also on a number of minutely detailed points.

94. The Workers' members emphasized that the General Survey came at a crucial time for social policy in general and for the ILO in particular. Due to the globalization of the economy and the recent political changes, workers' and employers' organizations, as well as the public authorities, were facing new challenges, numerous and important. These diverse factors unified and strengthened each other: primarily, the result was a generalized intensification of competition which should be counterbalanced by international rules. The ILO and its fundamental principles, tripartism, freedom of association and free collective bargaining, had always been considered the cornerstones of a universal social and economic framework. These principles were also the fundamental objectives during the creation of the ILO in 1919 and its strengthening in 1944. The challenges which must now be met required updating in the sense of a strengthening of the functioning and impact of the ILO. The General Survey, which the Committee of Experts had rightly placed in the present context, met expectations and was a very current and usable frame of reference. The survey would have beyond a doubt a profound influence on the future action of all the supervisory bodies. The Workers' members also noted with satisfaction that the Committee of Experts had taken into account the work of the Conference Committee on Standards, as had been announced already in paragraph 3 of the survey, even if these two committees had a different mandate and different working methods. The Committee of Experts had replied unambiguously to the numerous observations based, in particular, on some provisions of the Vienna Convention or on other texts or legal theories.

*The relationship between trade union rights
and civil and political liberties*

95. The Employers' members generally supported the comments of the Committee of Experts on this subject, but with certain nuances. The beginning of this chapter, which in particular made reference to other international texts, lent to the observation that sometimes, in practice, there was some opposition between individual rights and collective rights, whereas that should not normally be the case. The right of every person to establish and join organizations was the very foundation of freedom of association. The comments and recommendations of the Committee of Experts on this subject concerned the fundamental rights and liberties which every citizen should be able to invoke, worker or employer, who wishes to join an organization and participate in its activities. For the Employers' members, respect for these principles was the indispensable prerequisite for the existence of a state of law respectful of democratic rules. For a number of years, this Committee had recalled that the violation of civil liberties had negative repercussions on freedom of association. The Committee had the duty to draw attention to the regrettable situations of this type when they occurred and to

request the necessary changes. There were a number of difficulties in this respect and the ILO and the employers should continue to cooperate in order to resolve them. These substantial problems which were raised in the course of this discussion, as a rule lay well outside the subtleties concerning the right to strike, and indeed had nothing to do with it. The real and recognizable difficulties, obstructions and shortcomings concerning freedom of association in its practical application formed an important field of action for the supervisory bodies of the ILO. There was considerable agreement on this subject, constituting a base for effective action in this field and this opportunity should not be lost. The differences of opinion about the limits of strikes should not be allowed to imperil the general measure of agreement. However, controversial matters needed to be discussed at somewhat greater length than questions on which there was agreement.

96. For the Workers' members, collective rights gave rise to harmonious development and the reinforcement of individual rights. There was therefore a veritable complementarity between the two. Furthermore, freedom of association was a principle the consequences of which reached far beyond the framework of labour law in the classic sense of the word. In the absence of a democratic order respecting political rights and freedoms, freedom of association could not fully develop in all its aspects. Convention No. 87 and the constitutional principles of freedom of association, which must be respected by every State whether or not they have ratified the Convention, imposed an obligation of result on the authorities responsible for the police, as well as for the administration of justice and the for the judiciary power. The public authorities must not remain complacent by simply tolerating the existence and the functioning of workers' and employers' organizations; they must create and maintain all the necessary conditions so that these organizations may develop, without interference, within the framework of a true political, social and economic democracy. Each year during the discussion of the individual cases, however, the Committee noted that legitimate trade union activities were considered as criminal offences in some countries and that they were suppressed by the authorities or even by paramilitary groups acting with complete impunity. The Workers' members also stressed that it was particularly important that an independent, easy accessible, judiciary system be established — a subject which it would be desirable to provide for in a specific international instrument — and that the victims of this type of repression could thus obtain compensation for the prejudices caused.

97. The Workers' members also deplored the very serious attacks on freedom of association which were the result of measures taken in certain countries, for example, the internment of trade union activists in "education through labour" camps, who were thus forcibly integrated into a parallel economy which exported products and services around the world. The Workers' members of Colombia and of Guatemala moreover underlined the deplorable situation prevailing in their countries and in several countries in Latin America, as could be seen by the number of cases of violation of fundamental rights brought before the Committee on Freedom of Association. The Workers' member of New Zealand also gave resounding homage to the workers who had been victims of serious violations of fundamental rights simply for having wanted to defend freedom of association,

and sometimes losing their life for it. The Workers' member of France stressed the utility and the effectiveness of the ILO supervisory machinery which had, for example, contributed to the setting up of truly free and democratic trade-unionism in Poland.

98. Several Government members (Finland, Portugal, Uganda) endorsed the views expressed by the Committee of Experts on the necessary link between civil and political liberties and trade union rights. The Government member of Germany agreed with the Workers' members that the situations described in this part of the survey were particularly disturbing.

The right of workers and employers to organize

99. The members of the Standards Committee of the Conference stated that they were generally in agreement with the comments of the Committee of Experts on this question. Several reservations were however expressed concerning the issue of trade union security.

100. The Workers' members indicated on a general level that the possibility, in fact as in law, of establishing trade union organizations was an indispensable prerequisite to the proper functioning of freedom of association and free collective bargaining. If the recent process of democratization had given rise to progress on this point as compared with the situation in 1983, there were nevertheless a series of measures and practices in a number of countries which hindered, sometimes openly, the right to organize for workers. The desire to obtain a competitive advantage, to perpetuate a not very democratic control over workers, the explanations based on the so-called obsolete nature of international standards or even the economic and cultural differences, were some of the reasons invoked by different countries and really constituted excuses more than true arguments.

101. The Workers' members subscribed to the position of the Committee of Experts according to which the only exceptions provided for in Convention No. 87 were the armed forces and the police; in case of doubt, workers should be considered as civilians and thus benefit from the protection of this instrument. These principles were also valid for all other workers who, in many countries, were refused trade union rights, for example: public servants, fire-fighters, prison staff, agricultural workers, workers in the informal sector, managerial staff, workers in export processing zones, migrant workers, etc. The Workers' member of Argentina furthermore drew the Committee's attention to the specific difficulties encountered by seafarers because of the greatly increased use of flags of convenience and second registers in such a way as to deprive an important group of workers of any of the protections of international labour conventions, in particular, in the area of freedom of association. This problem should be remedied by the ILO.

102. According to the Workers' members and the Employers' members, the right of workers and employers to establish organizations should not be hindered by unduly complex and long registration procedures which did not offer all the guarantees of necessary objectivity and which, in practice, amounted to a system of previous authorization. The Workers' members indicated that these problems were particularly serious in systems of enterprise trade unions because of the

necessity to register each time, as well as in the free export zones, a problem raised many times in the General Survey. Moreover, several free trade unions, established recently or for a certain number of years, were also facing obstacles in countries which applied a system of semi-official trade union monopoly, and even official, in favour of a union close to the political power.

103. As concerned the right of workers and employers to establish organizations of their own choosing, the Workers' members commented on three points. First, in systems of enterprise trade unions, many workers were deprived of the right to organize when legislation imposed an excessive threshold as to the minimum number of members. This situation was worsened by the increasing number of small and medium enterprises and the greater recourse to subcontracting. The second important theme concerned the relationship between, on the one hand, trade union diversity and, on the other, the requirements of effectiveness and feasibility in collective bargaining at all levels. The bilateral and tripartite social dialogue could not be limited only to the enterprise, but should be held at every level and deal with every facet of social and economic policy. An excessive multiplication of workers' and employers' organizations, like a trade union monopoly imposed by law, ran the risk of weakening the quality of the social dialogue and damaging the members' representation. The balance to be found depended to a large extent on the particularities of the labour relations system in each country. The Workers' members also underlined that maintaining this balance, particularly in systems of centralized negotiation, might become difficult when trade unions by category, such as managers, claimed recognition as the most representative trade union at the national and federal level. Thirdly, the survey confirms that the clauses and practice of trade union security were not covered by the Convention. Given that these clauses were often criticized by governments which had adopted an anti-union policy, it was not surprising that the trade unions concerned looked to protect themselves by using clauses of this nature.

104. The Government member of Iceland stated that his country and many other States were concerned about several problems raised with respect to Convention No. 87 such as closed shop systems, trade union security clauses and the notion that it was worth calling up the negative side of freedom of association. Governments were often confronted with a dilemma in this regard: on the one hand, they try to guarantee trade union security by allowing the social partners to negotiate on priority employment clauses, particularly when the employment market is restricted and fragmented as in Iceland; on the other hand, they are expected to neutralize the negative aspects of freedom of association by prohibiting trade union security clauses. This question was equally linked to the search for greater flexibility in the labour market, as well as to the desires to substitute individual labour contracts for collective agreements, a tendency which was reflected in other regional instruments. The Committee of Independent Experts of the European Social Charter had for its part considered that article 5 of the Charter covered both positive and negative freedom of association and that trade union security clauses were in violation of the Charter. The European Court of Human Rights arrived at the same conclusion with respect to article 11 of the European Convention on Human Rights, without determining however if this

negative right should benefit from an equivalent protection to that given to the positive right. This gave rise to the thought that the latter, in certain circumstances, might benefit from better guarantees.

105. Supporting the general observations of their group, several Workers' members also remarked on the specific situation in their own countries with respect to the comments of the Committee of Experts on this subject. Thus, the Workers' members of the Czech Republic and of Japan evoked specific problems concerning the right to organize for public servants or certain workers in the public sector, for example fire-fighters or prison staff; the Committee of Experts had now clarified this question. The Workers' member of Senegal stressed that workers, particularly in French-speaking Africa, were often refused functions of responsibility in unions because of distinctions based on nationality even though they enjoyed popular support from their constituents. The unanimous position of the Committee of Experts on trade union monopoly had now been consecrated, as was underscored by the Workers' members of Poland and Spain, the former specifying that Convention No. 87 had undoubtedly furnished powerful arguments for the Solidarity union in its struggle for the recognition of truly independent trade unions. The Workers' member of Norway, speaking on behalf of the Workers' members of Denmark, Finland, Iceland and Sweden, firmly supported the conclusions of the Committee of Experts on the questions of trade union security. They pointed out, however, that a contradictory jurisprudence on this subject might develop between the ILO and the European bodies.

106. The Employers' members remarked that, overall, the Committee of Experts repeated the comments made previously on this subject, for example concerning persons who could not be refused the right to associate because of the occupational category to which they belong, their nationality or their civil status or even the absence of preference for political reasons. The survey did not insist enough, however, on the fact that the guarantees under Article 2 of Convention No. 87 applied with as much force to employers. Other subjects such as the system of previous authorization existing in some countries, the conditions of registration equivalent to previous authorization, as well as the trade union monopoly imposed by legislation, had been discussed at length in previous years; the opinions of the Committee of Experts and this Committee in this regard were sufficiently clear and in agreement that it was not necessary to add to them.

107. The Employers' members nevertheless expressed serious reservations with respect to the differentiation made by the Experts between trade union security clauses freely negotiated and clauses imposed by legislation. This differentiation, which was perhaps no longer a true differentiation, was far too complex. If this reasoning were accepted, pressures through collective bargaining would be acceptable but not by state regulation. Reservations were necessary in this regard because there were countries where collective bargaining produced the same effects as legislation. The Employers' members thus did not see any real difference between the factual pressures and those exercised by legislation: for the individual the result was the same whether the pressure came from workers' organizations, employers' organizations or the State. In the opinion of the Employers' members, there was a logically obvious link between the freedom to join an organization and the freedom not to join. Freedom required the possibility

to choose among several options and the freedom not to join was an inalienable part of the guarantee for freedom. The Employers' members considered that on this point, the Committee of Experts did not follow the principle retained in paragraph 55 of the survey wherein it applied the principle that exceptions to a basic rule should be interpreted in a very narrow sense.

108. The Employers' members of Iceland and Romania, supporting the general observations of the Employers' spokesperson on these questions, made additional observations. The Employers' member of Iceland, referring to comments of her Government and the Workers' member of Norway, stated that the questions concerning trade union security clauses and the right not to associate were more complex than the General Survey implied and that further discussion was necessary with respect to paragraph 102. She had difficulty understanding in this context the difference between laws and collective agreements, particularly when the latter were extended to all workers by law and not only to those directly concerned by the agreements. The problem was aggravated in Iceland by the fact that the law required employers to deduct union dues from employees' salaries: it was difficult in these circumstances to speak of voluntary association of workers. To require, either directly or indirectly, people to join a union against their will was not reconcilable with the basic principle of the right to organize, nor with modern notions of personal freedom. In this regard, the Employers' member of Romania was also surprised by the fact that, according to his interpretation, the Committee transformed a right - which must be protected - into an obligation, and this under the guise of trade union security favouring trade union monopoly. According to him, the comments of the Committee concerning the deduction of dues at the source, for unionists as well as non-members, were contrary to Articles 6 and 9 of Convention No. 95 on the protection of wages, and the comments concerning the obligation of non-members to pay equal contributions to union dues in order to benefit from collective agreements were contrary to Paragraph 4 of Recommendation No. 91 on collective agreements.

109. Stating that the considerations made by the Committee of Experts in this chapter seemed relevant, the Government member of Portugal rectified the reference (paragraph 81, note 71) to provisions of Portuguese legislation concerning the minimum membership required for establishing a trade union, since the ratification of Convention No. 87 had brought about the abrogation of all contrary texts. The services responsible for the registration of trade unions no longer applied the Legislative Decree in question.

110. The Government member of Uganda indicated that his Government, with the technical assistance of the ILO, was undertaking a complete reform of all labour laws and that, for the first time, the social partners had been fully associated with this exercise. In particular, the Government enacted the Trade Union Amendment Legislation to extend trade union rights to workers who did not previously benefit from them, for example the civil service, teaching service and those in the Central Bank.

111. The Government member of the Czech Republic specified that the legislation of his country respected the Convention with respect to the rights of public servants; a draft Bill, considered to be in conformity with Convention

No. 87 and with several provisions of Convention No. 151 (not ratified by his country) is to be submitted to Parliament after consultation with the trade unions.

*Drawing up of constitutions and rules,
elections of representatives,
organization of administration and activities*

112. The members of the Standards Committee of the Conference were generally in agreement with the comments of the Committee of Experts on this matter.

113. The Workers' members, stressing the primordial importance of the autonomy of organizations, observed that it was remarkable that the countries which had very detailed regulations with respect to the functioning of trade union organizations often paid very little attention to social policy. Noting, as in the survey, that much progress had been made in this area, they encouraged these countries to pursue this policy in order to bring their legislation into total conformity with the principles of freedom of association. Furthermore, the Workers' members stated that they completely shared the firm and explicit position of the Committee, based on the preparatory documents of the Convention and also taking into account the context of globalization, when the Committee confirmed that trade union activities could not be limited to strictly occupational concerns. Workers' organizations should thus be able to voice their opinions on political issues in the broad sense of the term and, in particular, to express their views publicly on a government's economic and social policy.

114. For the Employers' members, the Committee of Experts had overall formulated appropriate observations on the application of these provisions of the Convention, even though they could not subscribe to its position in every detail; most of these observations did not therefore call for specific remarks. They observed, however, that the Committee of Experts had undertaken a delicate subject when commenting upon the question of the political activities of trade unions. The opinion put forth by the Committee in this regard seemed plausible but it was not strictly speaking deduced from the provisions of the Convention. The question of whether, and to what extent, workers' and employers' organizations should have political ties should be treated with a great degree of caution. If, as the Experts seemed to suggest, trade unions could intervene in any debate of this nature, it might become difficult to distinguish them from political parties. This would only result in the other political forces, which were perhaps stronger and more influential, inevitably considering them as competing political parties.

The right to strike

115. On the principle of the right to strike, a broad consensus was expressed in the Standards Committee. The Employers' members nevertheless specified that, according to them, the text of Conventions Nos. 87 and 98 did not include the right to strike and expressed their disagreement with the scope given to this right by the Committee of Experts. Some Government members expressed some reservations with respect to the public service.

116. The Employers' members made detailed comments on this question, clearly stressing on a number of occasions that they did not challenge the principle of the freedom to strike and lock-out, but they absolutely could not accept that the Committee of Experts deduced from the text of the Convention a right so universal, explicit and detailed, as it had done in this part of the survey.

117. Almost all the chapters began with a relevant passage of the Convention. This could not however be the case on this point since strike was not mentioned either in Convention No. 87 or in Convention No. 98. Furthermore, the survey placed a great deal of emphasis this year on the historical aspects of these instruments; this historical method of interpretation however was only of secondary importance since, in the first place, must come the text, the purpose and the meaning of the provisions themselves. There were no concrete provisions and it was not helpful to quote the standards contained in the instruments of other organizations where strikes and collective action were sometimes mentioned in another context and in a very general or only indirect manner.

118. The beginning of the chapter rightly indicated that the right to strike was mentioned during the preparatory work, but adds in paragraph 142 that "... during discussions at the Conference in 1947 and 1948, no amendment expressly establishing or denying the right to strike was adopted or even submitted." The Employers' members however quoted the following passage: "Several Governments, while giving their approval to the formula, have nevertheless emphasized, justifiably it would appear, that the proposed Convention relates only to the freedom of association and not to the right to strike, a question which will be considered in connection with Item VIII (conciliation and arbitration) on the agenda of the Conference. In these circumstances, it has appeared to the Office to be preferable not to include a provision on this point in the proposed Convention concerning freedom of association." (31st Conference, 1948, Report VII, page 87.) A similar conclusion was made in the plenary sitting: "The Chairman stated that the Convention was not intended to be a 'code of regulations' for the right to organize, but rather a concise statement of certain fundamental principles." (31st Conference, 1948, *Record of Proceedings*, Appendix X, page 477.) Later, Recommendation No. 92 on voluntary conciliation and arbitration dealt with this issue in a neutral manner without regulating the contents. During the plenary sitting, the famous Workers' spokesperson, Léon Jouhaux, bitterly complained of the unsatisfactory result of the discussion; he did not explicitly mention the absence of the right to strike, but other delegates did. Moreover, during the adoption of Convention No. 98, two requests presented by Workers' delegates with the aim of including a guarantee of the right to strike were rejected on the basis that it was not covered by the proposed text and that this question should be dealt with at a later stage. (32nd Conference, 1949, *Record of Proceedings*, Appendix VII, pages 468 and 470; see also ILO, *Industry and Labour*, Vol. II, July-December 1949, pages 147, et suite.) Shortly afterwards, a Government delegate made the same request which the chairman declared unreceivable for the same reasons.

119. Under these circumstances, it was incomprehensible to the Employers that the supervisory bodies could take a stand on the exact scope and content of

the right to strike in the absence of explicit and concrete provisions on the subject, and that this absence seemed precisely to be the justification for their position, as is suggested in paragraph 145. The Committee of Experts had put into practice here what was called in mathematics an axiom and in Catholic theology a dogma: that is complete, unconditional acceptance of a certain and exact truth from which everything else was derived.

120. Article 3 of Convention No. 87 which confers to organizations the right “to organize their administration and activities and to formulate their activities” did not mean, according to the Employers’ members, the right to intervene in the rights of others. In paragraph 136, the Experts rightly stated that “the exercise of this right inevitably affects third parties who sometimes feel that they are the victims in disputes in which they have no part”. This assertion of the Committee’s had been increasingly confirmed with respect to all labour disputes. In any event, strikes were clearly not an internal and autonomous matter of a trade union; they were above all directed against employers and, in today’s world with its division of labour, the effects of a strike which were regularly and deliberately calculated increasingly touched third parties and the general public who had nothing to with this conflict. Sympathy strikes, by their very nature, were aimed at people who were not directly involved in the conflict. The interpretation of the Committee, which was creating and developing law, did not allow for the conclusion that the right to strike was an intrinsic corollary of the right to organize, as asserted in paragraph 151 of the survey.

121. The Employers’ members also felt it important to note that they were not so much criticizing the fact that the Committee of Experts wanted to recognize the right to strike in principle, but rather that it took as a point of departure a comprehensive and unlimited right to strike. The views of the Committee of Experts on the various forms of strike and their scope were obviously based on erroneous premises. The Committee did not generally examine whether strikes were permissible, nor the question of how far a strike can go. Beginning with the erroneous premise of an unlimited right to strike, the Committee considered rather whether limitations on the right to strike were permissible. According to the Committee, any limitation on the right to strike required a specific justification, which could be seen in the treatment of all the important cases. Two examples could be given in this respect: the public service and political strikes.

122. According to the Employers’ members, the Committee of Experts considered that restrictions on strikes in the public service were only allowable if the strike affected the essential services, an expression which the Experts later defined in the strict sense of the term. Consequently, the Committee came to accept restrictions on the right to strike only in cases where the strike might endanger the life, personal safety or health of whole or part of the population. The Employers’ members had already responded in this respect that a State could not accept that its duty to protect the welfare of its citizens be restricted to the values of life and health. It can be seen that, in paragraphs 158 and 159, the Committee of Experts had applied a different approach by adopting a very cautious formula. The Committee considered that some restrictions on the right to strike might be permissible under certain circumstances, while leaving the question open. One might discern the sign of a new approach but, looking at the

specific application of this approach to concrete examples concerning some countries, one quickly realized that the Committee had fallen back on its old formula, hurrying to forget its weak attempt at revision.

123. Still according to the Employers' members, the position of the Committee of Experts with respect to political strikes had also been influenced by the above-mentioned principle of unlimited strike. For a long time, the Committee only admitted the possibility of limitations for "purely" political strikes. However, the number of cases where the Committee applied this approach demonstrated that purely political strikes virtually did not exist since it had often assimilated political strikes to a protest against government policy, a form of strike which it had always considered acceptable. The Employers' members expressed their concern for the fact that, from this point of view, consideration was never given to the fact of a democratically elected parliament and yet, the social partners were not above the law. Regrettably, the Committee of Experts often considered that some strikes were a protest against the government, while in reality, these strikes were against decisions of a freely elected parliament. In these circumstances, it would seem more reasonable and in greater conformity with democratic rules to submit the question of strike and lock-out to the legislator of the ILO, i.e. the International Labour Conference, where, after sufficient preparation and an open debate, this area, which was still open, could be made the subject of a specific regulation.

124. In their final remarks on the right to strike, the Employers' members, in response to some comments from the Workers' members, recalled that they were not simply set on denying the right to strike, but had, to the contrary, put forward numerous and well-founded arguments for their position. First, the Employers' members had made recourse to historic arguments, the basis of which was disputed by some workers, precisely because the survey itself placed a great deal of emphasis on this. Basing themselves on these texts, the Employers could thus demonstrate that the right to strike had not been provided for in Conventions Nos. 87 and 98. This argument was all the more convincing by the fact that the right to strike had not been forgotten during the elaboration of these instruments: attempts had been made to incorporate this right into the Conventions but had been rejected in the absence of a majority in favour. Secondly, several speakers simply asserted that there was a comprehensive right to strike because there had to be, as without the right to strike, there could be no freedom of association. It was impossible to seriously argue against this type of preemptory statement which likened the right to strike to a sacred workers' right. Thirdly, numerous speakers cited other regional or international instruments dealing with the right to strike, lock-out, etc., but these were not relevant to the interpretation of ILO instruments. An extensive right to strike did indeed exist in some countries, but elsewhere the situation was entirely different. This was a matter for national law, but in no way was it a right established by ILO instruments or derived from them.

125. As regards the statement of the Workers' member of Poland that Conventions should be interpreted in a dynamic and functional manner, the Employers' members saw in this an admission that there was no legal basis for the right to strike in ILO instruments. There were rules of interpretation in international law provided for by Articles 31 and 32 of the Vienna Convention on

the Law of Treaties which the Experts themselves used in their interpretations. Two objections were raised in this regard. First, the Vienna Convention dated back to 1969 and banned retroactivity. In Article 4 of this Convention, however, it is said that this ban on retroactivity did not apply to general rules of international law, and the rules of interpretation in Articles 31 and 32 of the Convention were such rules. Secondly, Article 5 of the Vienna Convention provided that it “applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization, without prejudice to any relevant rules of the organization.” There were no rules of interpretation in the constituent instrument of the ILO and article 37 of the Constitution only indicated the competent body without establishing authentic rules of interpretation.

126. Finally, with respect to the statement made by the Workers’ member of the United Kingdom according to whom even if the standards did not contain detailed provisions on the right to strike, this right was generally and implicitly recognized, the Employers’ members stated that this argument was not enough as no rule of international law could be derived from it upon which the situation in every member State could be examined and, if necessary, criticized. There must be more precise provisions in order to conclude the existence of a right. Nevertheless, the Experts have gradually and systematically elaborated not a general principle on the right to strike — as they should have done — but rather an almost unlimited right to strike, accepting less and less any restrictions on this right. If the views of the Committee of Experts were generally accepted, then workers should no longer have any objection to placing this matter on the agenda of the Conference, thus clarifying the question. The Employers’ members, however, were quite certain that the final result would not be the type of right to strike elaborated by the Committee of Experts.

127. Supporting the comments of the Employers’ spokesperson, the Employers’ member of the United States observed that, considering the legislative history of these Conventions and the observations of the Experts in the 1950s, no one could have anticipated the extremely explicit and detailed interpretation now made by the Committee of Experts. The speaker recalled that, in the 1953 survey on Convention No. 87, the Committee stated that: “The object of this Convention is to define as concisely as possible the principles governing freedom of association, whilst refraining from prescribing any code or model regulations.” (ILC, 36th Session, 1953, Report III, Part IV of the Committee of Experts on the Application of Conventions and Recommendations (articles 19 and 22 of the Constitution), page 57.) The Committee asserted however in paragraph 13 of the 1994 survey that all of the principles which it applies constitute “a veritable international law of freedom of association”. This flew in the face not only of the 1953 statement but also of what it rightly stated in paragraph 20 of the 1994 General Report: “... ILO instruments, whether new or revised, set minimum standards (article 19, paragraph 8, of the Constitution). As a matter of principle, Conventions should set a general framework.”

128. The speaker recalled that, in making observations regarding the application of ratified Conventions, the Committee of Experts normally based itself on the text of the convention and its legislative history. With respect to

Conventions Nos. 87 and 98, however, the Committee had moved away from this practice and also applied the principles of the Committee on Freedom of Association. By endorsing the conclusions of the Committee on the meaning of these Conventions, the Committee of Experts has subverted the supervisory machinery. No less an authority than Mr. Nicolas Valticos had pointed out that the conclusions of the Committee on Freedom of Association were not limited to determining the meaning of the freedom of association Conventions and that, not being bound by the terms of these Conventions but more generally inspired by the principles of freedom of association, the Committee was led to formulate the principles which on various points extended the express provisions of the Convention. This reliance on decisions of the Committee on Freedom of Association, decisions which went beyond anything contemplated by the provisions and legislative history of these Conventions, undercut the credibility of the Committee of Experts, a credibility which remained vital to the effectiveness of the Conference Committee on the Application of Standards.

129. The speaker noted that, when the right to strike was discussed in the Standards Committee of the Conference, a confusion arose between two distinct questions which it was worth distinguishing. The first is whether trade unions have the right to strike; on this point, there is a general unanimity, although the right to strike was not without limits. The second question, more relevant to this Committee, is the following: do Conventions Nos. 87 and 98 include the right to strike and, if so, to what extent? Everyone would agree that the right to strike was not explicitly provided for in these instruments. The Committee of Experts indicated in paragraph 142 of the survey that the right to strike "... seemed to have been taken for granted in the report prepared for the first discussion of Convention No. 87 ..." and that "during discussions at the Conference in 1947 and 1948, no amendment expressly *establishing* or *denying* the right to strike was adopted or even submitted." Even if correct, these were quite slim reeds for the Experts to rely on as a basis for its extensive regulation of the ability of governments to place limits on the right to strike given the fundamental nature of such a right. Besides the fact that this document was prepared by the Office, the legislative history of Convention No. 87 was unequivocally clear that "the proposed Convention relates only to freedom of association and not to the right to strike". Furthermore, as was emphasized by the Employers' spokesperson, during the final discussions of Convention No. 98 in 1949, the Conference Chairman declared unreceivable the two amendments aimed at incorporating a guarantee for the right to strike as they were not within the scope of the Convention. The speaker thus expressed the opinion that the passage in question constituted a factual error with respect to the historical basis of the right to strike being fundamentally inherent to these Conventions.

130. The speaker recalled that the Committee of Experts mentioned the right to strike for the first time in its third General Survey on the subject in 1959, in only one paragraph and only with respect to the public service. In the following surveys, the Committee gradually expanded its views on the matter to seven paragraphs in 1973, then 25 in 1983 and finally arriving in 1994 with a separate chapter of no less than 44 paragraphs, including a number of new subjects.

131. Underlining that the Experts stated in paragraph 145 that: "In the absence of an express provision on the right to strike in the basic text, the ILO supervisory bodies have had to determine the exact scope and meaning of the Conventions on this subject", the speaker stated that the Committee of Experts' function was to interpret existing provisions and not to substitute for legislators; it is not up to the Experts to create requirements with respect to questions upon which the technical committee could not agree. To base oneself on the part of Article 3 which states "Workers' and Employers' organizations shall have the right ... to organize their ... activities and to formulate their programmes" is a very indirect and subjective method for concluding the existence of the right to strike in Convention No. 87. It was also a surprising method, as it concerned a right as fundamental as the right to strike which one would have expected to find as an express provision in the text of the Convention itself.

132. The speaker stated that, given the silence of the two Conventions on the right to strike, it would be better to substitute a more pragmatic approach for the optimal approach taken by the Experts whereby the Conventions would only be concerned with general prohibitions to the right to strike rather than the finer details of whether the strike involved essential or non-essential services or whether public servants exercised authority in the name of the State. Noting that the Experts seemed to have chosen a more pragmatic approach in paragraph 160 on the question of strikes in essential services, in response to the wishes expressed for several years by the Employers' members, they considered that this determination was made on a case-by-case basis and not according to the almost uniform approach mentioned in the 1983 survey (paragraph 214, footnote 3) frequently used in the past.

133. Moreover, the speaker remarked that this year, for the first time, the Committee of Experts has addressed the issue of replacing strikers. The speaker indicated his concern that the Committee make such an observation in the abstract, particularly when it was based on two decisions of the Committee on Freedom of Association, the conclusions and recommendations of which were less strict than the observation of the Experts in paragraph 175 since the former only found that there was risk of a derogation of the right to strike. This observation of the Committee of Experts, which might be raised within the framework of the controversial, political debate taking place in the United States, was not appropriate, especially if one considered that it involved only a small aspect of a balanced and complex system of industrial relations.

134. In reply to criticisms of the attitude attributed to the Employers' members concerning the ILO, standards and the support given to the supervisory bodies, an attitude which had allegedly radically changed according to some Workers' members, the speaker, supporting the general comments made by the Employers in this regard, recalled that it was not the Employers who had tried to destroy the ILO system but rather some countries. The Employers, to the contrary, had always supported the system and muted their concerns in the general interest.

135. The Employers' member of Nicaragua added that the right to strike should only be exercised after all other recourse foreseen for resolving conflicts

had been exhausted. According to the Employers' member of Romania, the Committee of Experts sometimes made interpretations which contradicted provisions of other standards adopted by the ILO and the exercise of the right to strike could interfere with other rights just as fundamental.

136. The Workers' members stated that the right to strike was an indispensable corollary of the right to organize protected by Convention No. 87 and by the principles enunciated in the ILO Constitution. Without the right to strike, freedom of association would be deprived of its substance. It was enough to go through the preparatory works of Convention No. 87, the multiple conclusions and recommendations of the Committee on Freedom of Association and the successive general surveys elaborated by the Committee of Experts on this subject to be convinced of this. In its 1994 survey, the Committee of Experts formally and unambiguously confirmed this relationship by dedicating a separate chapter to the principles and modalities of the right to strike which it placed in the current context: growing interdependence, globalization of the economy, fragmentation of enterprises and the obsession of competitiveness. The Experts also established current and operational orientations, not only for this Committee, but also for all governments and all workers' and employers' organizations.

137. The Workers' members pointed out that, as indicated in paragraph 165 of the survey, strike objectives could not be limited only to the conflict linked to the workplace or the enterprise, particularly given the phenomena of enterprise fragmentation and internationalization. This was the logical consequence of the fact that trade union activities should not be limited to strictly occupational questions. Moreover, this enterprise fragmentation was partly due to the social policy of many governments to provide various advantages to small and medium enterprises; there was a danger in this weakening of collective rights if certain precautions were not taken, as mentioned in paragraph 335. This was the reason why sympathy strikes should be possible, as well as strikes at the sectoral level, the national and the international level.

138. The Workers' members also stressed that account had to be taken of all of this context when considering the question of modalities for carrying out strikes, such as picketing or occupation of the workplace. Often called upon to make this judgement, the judiciary power had a tendency to suppress these forms of strike, whereas it should do everything possible, if the judicial system in the country permitted, to ensure respect for international obligations and the ILO Constitution. The Workers' members also invited the Governments to verify whether the legislation, practice and jurisprudence of their countries were in conformity with the principles enunciated in paragraph 174 and, if not, to take the necessary corrective measures. As indicated in paragraph 137, detailed and restrictive legislation would not stop wildcat strikes and unorganized actions. By considerably limiting the scope of action of trade unions by legal or administrative restrictions, governments and employers might find themselves increasingly faced with spontaneous actions.

139. According to the Workers' members, possible restrictions on the right to strike in essential services and for certain categories of public servants should be restrictively defined given that they are exceptions to a general rule concerning

a fundamental right. The Workers' members strongly hoped that the nuanced position thus expressed by the Experts would put an end to the controversy which sometimes hindered the work of this Committee. In paragraphs 161 and 254, et suite, the Experts rightly emphasized the need to give full priority to negotiated solutions.

140. In their final observations concerning the right to strike, the Workers' members reiterated their general agreement with respect to the approach adopted by the Committee of Experts and commented upon the observations made by some speakers. First of all, they noted that the Government and the Employers' members accepted the principle of the right to strike. The reservations expressed concerned not the right to strike but rather the modalities and the extent to which national conditions should be taken into account. Secondly, most of the reservations expressed by the governments only concerned the right to strike in the public service, considered to be a restrictive interpretation. Thirdly, expressing their surprise at the fact that the Employers' members relied on a declaration of a Workers' delegate to the 1949 Conference, the Workers' members expressed their preference for the method used in the General Survey and the examination, in particular, of legislation and practice in order to evaluate the real situation in the field. Fourthly, they stated that a new discussion at the Conference, as suggested by the Employers, of an essential aspect of a fundamental Convention dealing with human rights as Convention No. 87 did, was not a good idea. Such a discussion might paralyse tripartism and the ILO just at the time when the ILO should be developing dynamic action. As concerned the suggestion of the Employers' members to entrust to the legislators of the ILO, i.e. the Conference, the care to set the modalities of the right to strike, the Workers' members recalled that a draft resolution on this point had been introduced at an earlier session of the Conference by the Government of Colombia, a country which was experiencing very serious problems with respect to the application of Conventions Nos. 87 and 98, including before this Committee. On the other hand, the Committee of Experts unanimously, all the Workers' members and a large majority of the Government members were of the opinion that effective protection of freedom of association necessarily implied operational rules and principles concerning the modalities of the right to strike.

141. The Workers' members also rejected the position of the Employers' member of the United States according to whom the inclusion of Convention No. 87 as such in a social clause would not be opportune. They emphasized that the Employers' members really only criticized the substance of one of the ten chapters, expressing only some reservations on certain aspects of the rest of the survey. The simplifying of the freedom of association Convention into one single sentence in a social clause would not, therefore, make much sense.

142. As concerned the observations of the Employers' members and, in particular those of the Employers' member of the United States, on the changes occurring in the world and the need to adapt to them, the Workers' members were fully aware of this but they could not accept that these changes would weaken workers' organizations and the collective bargaining systems put into place over the years. On a related point on the discussion concerning the relationship between individual rights and collective rights, the Workers' members

indicated that they did not dispute the practical importance of individual rights for workers, but nevertheless stressed that collective bargaining and collective rights in general were a very important source of rights for the promotion of the development of individual rights. If on the one hand they were in favour of a strengthening of certain individual rights, for example equality of opportunity, occupational training, family leave, etc., they were opposed, on the other to an individual approach which would tend to weaken collective bargaining.

143. Numerous Workers' members spoke to support the general observations, to emphasize specific aspects of this part of the General Survey or to draw the Committee's attention to the situation prevailing in some countries. All endorsed without reservation the approach adopted by the Experts concerning the interpretation of Article 3 on the right to strike. Thus, the Workers' member of Poland underlined that the Committee had only applied well-established principles, Convention No. 87 calling for a dynamic and functional interpretation. According to the Workers' member of Germany, if the Employers recognized the principle of the right to strike, it was not logical that they contest the means used by the Committee to interpret this principle. The Workers' members of the Netherlands and the United Kingdom stated that the Experts had developed their views on this question in a very cautious, gradual and balanced manner, with the support of a majority of the Conference Committee; it was preferable that the general consensus established in this regard not be shaken up. Recalling that strikes were an essential means of defending the economic, social and occupational interests of workers, the Workers' member of France particularly called into question the position of the Employers on sympathy strikes, emphasizing that there were problems of solidarity generally and that trade union structure was often interoccupational. Furthermore, he criticized the use made by the Employers of the declarations on strikes made by a Workers' member in 1948 and the exaggerated dramatization of the consequences of strikes. The real solution was not to give any reason for going on strike. Several other Workers' members also pointed out various forms of attack on the right to strike, for example: provisions making strikes a criminal offence, frequent limitations imposed on public servants, abuses with respect to the determination of minimum services.

144. Several Government members, including Finland, Germany and Venezuela, expressed general agreement with the Committee of Experts' position on strikes as an indispensable corollary of freedom of association and emphasized moreover that the Committee had explained that this was not an absolute right. According to the Government member of Venezuela, the Committee of Experts had only adopted the modern rules of interpretation of general legal standards by preferring a more flexible and dynamic interpretation to a literal and dogmatic one, taking into account not only the text, but also its precedents, in the context of its adoption and the changes which had occurred. It would have been surprising if a right so broadly accepted had been rejected by the ILO for a restrictive interpretation. For the Government member of Germany, if the authors of the Convention had not considered that the right to strike was a part of freedom of association, why would they have considered it necessary to specify that the recognition of trade union rights for public agents did not prejudice the question

of their right to strike? (See 30th International Labour Conference, 1947, Report VII, page 109.)

145. Several Government members, in particular the Government member of Germany, stressed that the problems in this respect often related to the public service, since in that case the employer was the government.

146. The Government member of Belarus, recalling that Conventions Nos. 87 and 98 did not expressly cover the right to strike, stated that this right was always exercised even if it did not appear in national legislation. The legitimacy of this right had to be appraised with respect to the consequences that its exercise might have for society, limiting these consequences as much as possible. A legal framework had to exist therefore, strike being only one of the means for resolving conflicts, and its exercise should be limited to such circumstances. In cases where the consequences of strikes had effects beyond the enterprise, the government might have to take measures and prohibition of the strike in such cases was conceivable.

147. Agreeing that the right to strike was truly an essential corollary to the right to organize, the Government member of Portugal expressed, however, some doubts about certain developments in the survey concerning for example: the exercise of the right to strike in the public service, the maintenance of employment relations, sympathy strikes or strikes protesting against social and economic policy, procedures for strikes, lawful forms of strike action, sanctions in the case of illegal strikes and minimum services. In order to consider the principles put forward by the Committee of Experts as rules of international law, the Conference would have to adopt them according to the principle of tripartism. If a Convention were to be adopted, would all the rules elaborated by the Committee have to be included? Would States which had ratified Convention No. 87 adhere to the new standard?

148. The Government member of the United States indicated that the President of her country had stated that he would sign a law prohibiting the replacement of striking workers. The legislative amendments had been adopted by the House of Representatives and were presently under consideration by the Senate.

*Dissolution and suspension of organizations
federations and confederations.*

149. The Workers' members stated that the measures for dissolution and suspension of organizations examined by the Committee in Chapter IV of the survey were extreme forms of interference which should be condemned because the authorities could use them at any time in order to paralyse the trade union movement. The simple fact of their existence had the same effect as the sword of Damocles wavering above the organizations. Judicial recourse, when it existed, was often ineffective due to its sometimes slow and complicated nature and did not always offer guarantees of the necessary independence and objectivity. Other problems had recently arisen with respect to the division of the property of trade unions closely linked to the political system in place within the framework of an institutional trade union monopoly with the aim of equitably redistributing its

supporters among the free and democratic trade unions. This redistribution should be organized as soon as possible and on an equitable basis. The Workers' member of Poland endorsed the position of the Committee of Experts on this point, stating however that it might have extended its scope — which essentially aimed at Central and Eastern Europe — to all the countries in Africa, Asia and America which have moved from a single party system to a pluralist democracy. He was of the opinion that the Committee could have emphasized more firmly and explicitly that the Convention placed an obligation on States to take such measures, after necessary consultation, as had been recalled by the Commission of Inquiry established to consider the complaint concerning the application by Romania of Convention No. 111 on discrimination (employment and occupation). He underlined that the absence of appropriate measures in this regard in numerous countries on the road to democratic reform represented one of the worst threats to the existence and functioning of independent trade unions.

150. As regards the restrictions placed on the right of organizations to join federations and confederations and to affiliate at the international level, the Workers' members stated that measures of this type were clearly designed to weaken the impact of the trade union movement and to undermine worker solidarity. Trade union organizations were thus trapped within a framework imposed by the authorities. Among the possible multiple consequences of this, they mentioned: the danger that trade union activities be restricted to strictly occupational matters concerning the workplace; the limitation of the scope of application of collective agreements and of social policy; the exclusion of certain categories of the population; the immobility and ignorance of workers faced with the increasing internationalization of the world; the danger of political control over the trade union movement; and finally, the weakening of tripartism at the national, regional and international level.

151. The Employers' members expressed their general agreement with the comments made by the Committee of Experts in these two chapters.

Right to Organize and Collective Bargaining
Acts of discrimination and interference

152. A fairly broad consensus developed in the Standards Committee of the Conference concerning the comments made by the Committee of Experts on Convention No. 98. The Employers' members and some Government members expressed, however, some reservations or nuances.

153. The Employers' members stated that the principle of protection against anti-union discrimination was clearly indicated in Article 1, paragraph 1, of Convention No. 98. Article 1, paragraph 2, illustrated this principle with examples; there was no doubt in this regard. On the other hand, the manner in which this protection had to be ensured was not so explicitly defined (which was not mentioned by the Experts) since the Convention limited itself to indicating that it must be "adequate". Several of the Experts' reflections on this point were understandable, but they were not directly derived from the Convention. The States therefore had a great deal of discretion in this regard. An excess of detail concerning protective measures could give the impression that it was an

exhaustive list; measures not included might not then be taken into account. The term “adequate” was thus preferred in the Convention because of its flexibility. In this way, it could be interpreted and applied differently with respect to different legal systems.

154. As regards protection against acts of interference, the Employers’ members emphasized that the Committee of Experts did not have any objection to the principle that employers may contribute to the financing of trade unions (paragraph 229) but did call into question the independence of *solidarist associations*. According to the Employers’ members it was sometimes difficult to distinguish between the two. Mutual trust between the employers’ and workers’ organizations was a sign of a solid social partnership but, unfortunately, the relationships between organizations were often described as a long line of relentless conflicts, using the language of the class struggle, whereas this was an image of the past in several places in the world.

155. The Workers’ members stressed that the exclusion of public servants in Convention No. 98 had to be restrictively interpreted. The number of individual cases in which the Standards Committee of the Conference discussed this question demonstrated the importance of the problem which was also raised within the context of privatization.

156. As concerned acts of anti-union discrimination, they recalled that effective protection during the period of employment, including termination of the employment relationship, was an essential aspect of the right to organize. Convention No. 135 completed these provisions with respect to workers’ representatives. The Workers’ members insisted that it was not enough for governments to tolerate unionism at the national or international level, but rather workers’ organizations should have available to them all necessary means for the development of trade union action and dialogue through the intermediary of their activists and of their members. Regrettably, numerous governments and employers had the tendency to consider the presence of unions in the enterprise as a plague, whereas they should be accepted as true partners because of their ability to structure, coordinate and mobilize which were important qualities in the development of a good human resource policy and the creation of a climate of trust. The practice and the examples given in the survey demonstrated that protection against anti-union discrimination left much to be desired in many countries which could usefully be inspired by the constructive recommendations of the Committee of Experts.

157. As concerned protection against acts of interference, the Workers’ members stated that it was illusory to hope for a free and autonomous functioning of trade union and employers’ organizations if there was interference between them. The numerous complaints concerning employer interference in trade union affairs in several countries illustrated the scope of the problem. In some countries, this interference was even preached as official policy. It was encouraging to note that some progress had been made in one country with respect to solidarist associations, but the problem still existed in other places. Several Workers’ members, in particular those of the Czech Republic, Guatemala, the Netherlands and Senegal, evoked the problems, sometimes extremely serious, which arose in

this regard in their own countries or those of other member States. This was particularly the case when armed forces and police intervened, sometimes openly and with the endorsement of the authorities, in labour disputes and in workers' affairs generally. This situation could not be tolerated, even if this type of intervention was not specifically prohibited by the Convention.

Promotion of collective bargaining

158. The Workers' members insisted on the fact, that under the terms of Convention No. 98, it was not enough to tolerate collective bargaining; its promotion implied a positive attitude, no matter what system was in force. The Committee of Experts made an interesting suggestion with the system of framework agreements which would enable the strong points of several systems to be taken advantage of at the enterprise and sectoral level as well as even the national and supranational level. This system allowed for reconciliation, on the one hand, of common orientations in negotiations, the protection of workers in unorganized enterprises and sectors, such as service sectors or part-time workers or those who have limited contracts, and decentralized bargaining on the other.

159. According to the Workers' members, the direct or indirect interference by the public authorities in collective bargaining in order to maintain competitive positions had become a major problem. Measures of this type taken at the national, international or even supranational level, such as the Council of Ministers of Finance of the European Union (ECOFIN) went against the principles of free collective bargaining. The reminder of the Committee of Experts on this point was extremely important. While supporting these general observations, several Workers' members described the numerous and serious problems with respect to collective bargaining in their own countries or in other member States. In this respect, the Workers' member of Argentina recalled the annulment of collective agreements by decree, and the Workers' member of Senegal pointed out the specific problems arising from the devaluation of the CFA franc.

160. The question of the tendency towards individualization of labour relations to the detriment of the structures and machinery for collective bargaining was also raised by several Workers' members, in particular those from New Zealand, Spain and the United Kingdom. The latter indicated that, if trade unions were prepared to adapt to any change resulting, in particular, from globalization, workers were not on the other hand ready to accept changes which aimed specifically at altering the bargaining power of unions. Perhaps it should be asked whether the so-called need for flexibility was actually a natural competitive force or rather a device to reduce the bargaining power of unions. To the extent to which the provisions of the Conventions aimed at balancing the positions of the parties, they should be respected. True economic prosperity could only last if everyone who contributed to it could share in it equally. The Workers' member of New Zealand pointed out that the Government and the employers had put into place an industrial relations scheme aimed at destroying trade unions in the large sectors of the labour market, particularly those in which the working conditions were the worst. Turning to paragraphs 297 to 318 of the survey, she indicated

that the recent Employment Contracts Act, which seriously increased the inequality between the power of employers and of employees, had begun to seriously erode collective bargaining.

161. The Employers' members, emphasizing that governments had a wide scope of appropriate promotional measures to choose from, stated that they did not share the concern of the Committee of Experts with respect to the tendency to reinforce individual rights over collective rights and the privatization of public enterprises. In industrialized countries, the only ones affected by this tendency, the age of collective thinking and regulation seemed to have come to an end. It was not a question of measures handed down from above, but rather a movement accompanying the evolution of contemporary tendencies which favoured increased autonomy and individualism. This did not mean that there would no longer be any collective bargaining or collective agreements, but their content would certainly change. ILO standards would have to adapt to the new situation by becoming more flexible in order to allow for greater differentiations depending on certain economic criteria. Supporting these observations, the Employers' member of the United States added that he had great difficulty understanding the Experts' comments on the dangers to collective rights because of measures, legislative or otherwise, favouring individual rights. Unions and other citizen groups in his country supported measures of this type.

162. The Employers' members supported without reservation most of the other observations made by the Experts in this chapter which showed that it was difficult to adopt a balanced position between the constraints arising from free negotiations on the one hand and the account given to national and global interests on the other. It was clear that, in the view of the Experts, freedom to bargain collectively was not unlimited as they recommended that the authorities try to convince the parties to take into account the interests of society and of the State. This should logically mean that, if the parties did not follow this advice, the Convention would permit certain restrictions on collective bargaining.

163. The Government member of Iceland, noting the complaint against his country submitted to the Committee on Freedom of Association, stated that a correct application of these instruments, particularly Convention No. 98 often created problems for governments. Governments had special responsibility for economic development which lead them sometimes to have to react quickly to prevent an economic crisis and massive unemployment, particularly when the economy depended upon one single activity, as in Iceland. The policy of his Government was nevertheless one of respect for its obligations under Convention No. 98 and of letting the social partners negotiate wages and other conditions of employment.

164. The Government member of the Czech Republic also pointed out the difficulties faced by governments which were sometimes called to intervene in the process of collective bargaining in order to maintain the stability of the macroeconomic environment and to keep inflation at a reasonable level. His Government recently had to decide to take such exceptional measures for the limited duration of the privatization process, in order to preserve the national economic interest.

165. The Government member of the United States pointed out that her Government had established three independent tripartite groups with the responsibility of reviewing the complex structure of labour management relations and to make recommendations for changes to the legislation and practice to facilitate the process of organizing and of collective bargaining in both the public and private sector. Administrative changes to the National Labor Relations Board (NLRB) were also being considered to ensure fair rules with respect to labour management disputes.

Highlights. Ratification of Conventions.

166. Most of the members of the Committee noted the increase in ratifications of Conventions Nos. 87 and 98 but pointed out that there was still progress to be made in this area given the fact that these were the most fundamental instruments of the ILO. They made an appeal in this regard, inviting the countries experiencing difficulties to request ILO technical assistance and emphasizing that the General Survey would, without a doubt, be a useful instrument to this end. Several of the members recalled that ratification without any true intention to apply the Convention did not correspond to the spirit of international labour standards.

167. The Workers' members expressed their surprise at the reasons given by some governments to justify or explain the non-ratification and noted that these were not well-founded reasons, but rather were pretexts. The principles of freedom of association and collective bargaining were constitutional principles universally applicable; the only difference concerned the supervisory procedures, in particular with respect to the competence of the Committee of Experts and this Committee.

168. The Employers' members remarked that the chapter concerning highlights of the last decade was helpful in giving a picture of the global situation and the problems encountered. They took note of the information given on ratifications and expressed their conviction that prospects in this area would be much better if the Committee of Experts had not made such a broad interpretation of these Conventions, particularly with respect to the right to strike. If these interpretations did not have a mandatory effect, they nevertheless were very dissuasive psychologically.

169. Recalling that his country had recently ratified Convention No. 98, the Government member of the Netherlands noted that some countries which had mentioned the social clause had not ratified Conventions Nos. 87 and 98. This was not a good example for developing countries and even for other countries which had not yet ratified the Conventions.

170. Several Government members, in particular those from Namibia and the United States, stressed that the application of standards was more important than their ratification. The Government member of the United States added that the legislation and practice in her country was largely in conformity with the ILO principles of freedom of association and that the ratification and implementation of Conventions was of increasing importance. The ratification by the United States of Conventions Nos. 144 and 105 was made possible by the tripartite

machinery established for assuring that legislation and practice were in conformity with ILO Conventions. Her Government would commit itself to this tripartite process to ensure that the legislation was in line with the obligations of the Convention and would make any necessary changes before ratification. If ratification of Convention No. 87 were envisaged, ILO technical assistance would be requested. The General Survey would also be very helpful in this process.

171. The Government member of the Czech Republic informed the Committee that a similar tripartite process had begun and was a body responsible for, among other things, examining the possibility of ratifying new Conventions. The Government member of Uganda also recalled the very recent ratification by his country of Convention No. 144 which moved in the direction of greater consultation with the social partners.

Final remarks on the survey

172. The Employers' members remarked that, in this brief recapitulation of their principal observations, the Experts seemed to desire a return to traditional values. As regards the concern of the Experts with respect to the phenomena of privatization and to some recent tendencies in the market economy, the Employers' members expressed their belief that workers would certainly find advantages therein and that these measures were indispensable to the survival of many enterprises. Among these measures were, first, the strengthening of competitiveness by the creation of smaller units of production which could more easily and more rapidly adapt. The Employers' members supported this type of positive and necessary evolution. They indicated their belief that the values and fundamental objectives of Conventions Nos. 87 and 98 would still play a role, even in a changing world. One could not, on the one hand, watch the rapidly changing world and believe that the ILO would not be affected: it had to be possible, as was rightly said by the Director-General in his Report, to defend values and promote change. The great principles and laws took their force from laying out essential values and leaving the details aside. From this distance, one could affirm that the ILO, in the years 1948-49, had wisely decided to limit itself to setting forth fundamental principles of freedom of association and collective bargaining in Conventions Nos. 87 and 98. The details added by the Committee of Experts should be gradually withdrawn.

173. The Workers' members stated that the Experts had very rightly placed their final considerations within the context of the extensive structural changes at the socio-economic level and in society in general. Even if the impact of this evolution varied greatly from one country to another, it was remarkable that similar problems were resolved in a radically different manner when the financial constraints were the same and that ILO standards and objectives were respected in some countries and not in others, or only partially. This gap was largely due to the priorities and differing political choices.

174. The Workers' members recalled that respect for the principles of freedom of association and free collective bargaining should not be subordinated to the political and economic situation or to the level of development. Standards did not imply direct labour costs but offered governments, workers and employers

and their respective organizations, the possibility of progressively developing their system while taking into account the social and economic context. It was from this perspective that one should look at the call by the Experts for a *world social platform* of which freedom of association and free collective bargaining were an essential component (paragraph 330). These standards set forth the essential rules for the functioning and development of the actors in the employment market and for a continual development of social and economic policy. This was why the constitutional principles of freedom of association and free collective bargaining were considered as fundamental labour standards. This classification was approved by the Governing Body in 1987. Conventions Nos. 87 and 98 were classified by the Governing Body in 1993 among the ten priority Conventions for which reports were due every two years.

175. The Workers' members recalled that since 1951, the ILO has established a specific tripartite committee, the Committee on Freedom of Association, which examines in a flexible manner complaints concerning the violation of the constitutional principles of freedom of association and free collective bargaining. It was important to recall that this Committee submitted its unanimous conclusions to the Governing Body. That was proof in itself that tripartism played an effective role in the search for solutions and the resolution of disputes.

176. The Workers' members pointed out that true tripartism, which presumes a total respect for freedom of association and free collective bargaining, was undergoing heavy attack in a number of countries because of structural problems, cyclical problems, or both. Some even attribute high unemployment to social dialogue. Tripartism and free collective bargaining however were in the long run an economically efficient method. Dialogue between the workers' and employers' organizations on the one hand and with the public authorities in a tripartite fashion on the other, guaranteed the democratic nature of society as well as the necessary social infrastructure to carry out a viable social and economic policy. This was also the position of the Experts, particularly in paragraphs 334 and 336.

177. The Workers' members stressed that the Experts had also drawn attention to the very real danger of the weakening, desired or not, of freedom of association and free collective bargaining (paragraphs 335-337) account being given to the intensification of competition and the diverse measures taken by enterprises, countries and regions in order to strengthen their position in the global economy. This danger can only be avoided if specific measures are taken to preserve fundamental rights. The Workers' members made a few suggestions in this regard, such as: (i) when enterprises are split or fragmented, the existing individual and collective rights, such as the action of trade union representation and the validity of collective agreements must be maintained (the ILO does not yet have a specific instrument in this regard); (ii) in order to safeguard collective rights in small and medium enterprises, a system of collective bargaining could be set up beyond the framework of the enterprise to the level of joint sectoral negotiation committees. Recognition of trade unions could also be based on systems surpassing the framework of the enterprise by the recognition of federations and confederations by sector. Within the system of recognition of trade unions by enterprise, the public authorities should use all means to encourage the employers, including the small and medium enterprises, to

recognize trade unions and to negotiate effectively. In paragraph 257, the Experts rightly emphasized the crucial importance of the conclusion of a *first* collective agreement; (iii) subcontracting networks should respect fundamental labour standards by the insertion of specific clauses in trade agreements and through collaboration; (iv) in the case of employment through temporary work agencies or private employment services, a theme being discussed this year in a tripartite Conference committee, the use of temporary workers to replace striking workers must be explicitly prohibited (see also paragraph 175 of the survey). Furthermore, the trade union rights of temporary workers must also be safeguarded.

178. The Workers' members also called upon governments and employers to respect or ensure respect for the principles of freedom of association and free collective bargaining and associated themselves with the Experts' call in favour of the ratification of Conventions Nos. 87 and 98, a demonstration of support for the principles embodied in the Constitution. This call was important in the light of the 75th anniversary of the ILO, the Copenhagen Social Summit in 1995 and increasing globalization.

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179. In the final part of their intervention, the Employers' members remarked that during the time of East-West conflict, two members of the Committee of Experts systematically expressed their dissension on certain points, in particular those linked to the freedom of association Conventions, while the majority of the Committee contradicted this view and emphasized their unanimity on all points. Fortunately, these times were now gone by and there was no longer a situation which might be described as an emergency situation, making it necessary to demonstrate unity where there really were differences on the substance. Everybody would fully understand that this situation affected all members of the Committee in equal measure. It was a question of survival for this Organization and particularly of the supervisory system, that everybody should stand shoulder to shoulder on these fundamental questions. Anyone who failed to take account of that fact was either enviably young or had a very short memory, and anybody who wanted to exploit this fact to demonstrate that there had been a change of opinion on the Employers' side, would have to justify this before the court of his own conscience. The Employers' members' opinion had certainly not changed since the last General Survey on the subject was published in 1983. Furthermore, the problems discussed in those days touched upon substantial questions such as forced labour, trade union monopoly, dependancy of trade unions from the Communist Party and had nothing to do with the somewhat artificial questions of the limits of the right to strike. Could one really expect that the situation of the 20 Experts in the Committee of Experts would be any different from other legal bodies like the supreme courts of States, where it was normal to have legal dissenting votes, which were normally published? There were many differing opinions on the right to strike. Could one really expect the 20 Experts to be totally of one mind on every detail? While the official rules of the Committee left room for dissenting opinion by members, which may be published at their

request, the Employers' members would like to know what was the real general opinion in the Committee of Experts. As the next General Survey on freedom of association was still some time ahead, the Employers would welcome if in the meantime the Committee's reports in coming years would reflect new considerations on the number of controversial areas which might be taken up in somewhat different terms. They believed that this approach would do much to enhance the credibility and the effectiveness of the supervisory system.

Conclusions

180. The Committee concluded its work on the General Survey by noting that the debate, particularly rich and fruitful, gave everyone the possibility to express themselves on complex problems of freedom of association and collective bargaining, taking into account the global context. A wide consensus arose from the discussions on the General Survey. The Employers' members nevertheless expressed their disagreement on the question of whether the freedom of association Conventions included extensive and detailed regulation of the ability of governments to limit the right to strike. The Committee expressed the hope that the Committee of Experts' General Survey and the discussion in the Conference Committee would contribute to the recognition and promotion of the principles of freedom of association embodied in the ILO Constitution. It made a solemn call for the ratification of fundamental Conventions, the principles of which were at the core of the ILO mandate, and the respect of which was an indispensable prerequisite for the defence of workers' and employers' interests throughout the word, particularly in an international context characterized by very rapid changes and accelerated globalization of the economy.

D. The future of the ILO's standard setting

181. As stated above, the Committee decided to devote a special day during its general discussion to a debate on the theme of the future of ILO standards. The Committee of Experts in particular contributed its thoughts, and the Director-General of the ILO examined prospects for the Organization's standard-setting activities in a chapter of his Report to the Conference, while there were several statements in the Conference Plenary and the Resolutions Committee on the subject. The Conference's Committee on the Application of Standards is nevertheless specially well equipped to conduct a structured dialogue on the future of standard setting, since it is by its nature and activities more closely familiar with the potential and the limits of the standard-setting and supervisory system, as the Workers' members noted.

182. This was confirmed by the number of speakers (almost 50) from the three groups in the Committee, the scope and richness of the discussions, and the interesting technical or more fundamental proposals or suggestions made.

183. Following the discussion, the Committee expressed the hope that all views voiced in the general discussion, and in particular the special sitting on the future of standards, would be documented for the Governing Body and its Committee on Legal Issues and International Labour Standards for future