

INTERNATIONAL LABOUR
CONFERENCE

ONE HUNDRED AND FIRST SESSION
GENEVA, 2012

RECORD OF PROCEEDINGS

PLENARY SITTING
COMMITTEE REPORTS
INSTRUMENT ADOPTED BY THE CONFERENCE
RESOLUTIONS
DELEGATIONS

INTERNATIONAL LABOUR OFFICE
GENEVA

of cases should be published in due time on the second day of the Committee's work, as currently foreseen in the plan of work of this Committee, or at the very latest on the third day. The events of the last few years had clearly shown that the late publishing of the final list severely hampered the ability of governments to participate in an adequate manner in these proceedings. He further expressed the desire to continue to improve the working methods of the Conference Committee, and was confident that he could count on the understanding of the social partners in this regard in order to contribute to a more meaningful exchange of views and experiences among all parties.

20. The Government member of Brazil, speaking on behalf of the Group of Latin American and Caribbean Countries (GRULAC), supported the statement made by the Government member of Sudan reiterating its commitment to the work of the Committee. He also emphasized that the provisional working schedule of the Conference Committee planned for the adoption of the list of individual cases on the second day of its work, and asked that this deadline be respected.
21. The Government member of Brazil expressed the concern of his Government over the situation in the Committee regarding the publication of the list. He emphasized the need to preserve the supervisory system and called attention to the systemic risks of the current situation. He underlined the need to publish the list in time and reiterated GRULAC's call in this regard.
22. The Worker members stated that they were unable to negotiate a list of individual cases with the Employer members if the Employer members insisted that this list could not contain any cases concerning the right to strike. This unacceptable attitude jeopardized the credibility of the ILO's supervisory system, to which the Worker members remained committed.
23. The Employer members emphasized that it was important to remain dignified in difficult circumstances. The difficulties they faced in relation to the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) would become crystal clear in the presentation they would make during the discussion on the General Survey. The Employer members had to act in accordance with their statements in order to be coherent. Thus, the Committee could have had before it a proposed list of 25 cases for discussion on 14 Conventions, including six fundamental, two governance and six technical Conventions. This list was balanced and the Employer members refused to be seen as the party responsible for the current stalemate.
24. The Worker members stated that there had never been a negotiated list.

B. General questions relating to international labour standards

General aspects of the supervisory procedure

Statement by the representative of the Secretary-General

25. First of all, the representative of the Secretary-General indicated that this past year had seen continued engagement between this Committee and the Committee of Experts, as well as the continued evolution of the working methods of this Committee. The Tripartite Working Group on the Working Methods of the Conference Committee had built on its

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80. The Government member of Norway emphasized the need to strengthen labour inspection and social dialogue in the process of the implementation of the fundamental Conventions at the national level. She drew attention to the need to focus on women workers, workers in the informal economy and vulnerable groups of workers, as well as issues of equity and non-discrimination. Greater attention should also be paid throughout the work of the ILO to the comments of the supervisory bodies, and the social partners should play a more active role from the design stage in technical cooperation projects.
81. A Worker member of the Bolivarian Republic of Venezuela indicated that his country recognized fundamental workers' rights in the Organic Labour Act, which gave effect to the eight fundamental Conventions, and that it had achieved economic growth for the past few years while recognizing all the fundamental principles and rights at work. Collective agreements had been, and were being, negotiated in many sectors, and working hours had been reduced to 40 a week, with two rest days. Another Worker member of the Bolivarian Republic of Venezuela added that, through the establishment of workers' rights in law, the new model of production developed with the participation of the workers and an equitable distribution of wealth, her country was now recognized as one of the Latin American countries with the lowest levels of inequality.

Freedom of association and collective bargaining

82. The Employer members, with reference to the comments by the Chairperson of the Committee of Experts concerning the discussion of the right to strike in relation to the 1994 General Survey, emphasized that, as indicated in the present General Survey, they had clearly articulated their objections during the 1994 discussion to the interpretation by the Committee of Experts of the right to strike. While the Employer members acknowledged that a right to strike existed, as it was recognized at the national level in many jurisdictions, they did not at all accept that the comments on the right to strike contained in the General Survey were the politically accepted views of the ILO's tripartite constituents. As the Employers' group had consistently highlighted year after year, they fundamentally objected to the Committee of Experts' opinions concerning the right to strike being received or promoted as soft law jurisprudence. There was no mention of the right to strike in the text of Convention No. 87, and the determinative body to decide such rules recognized by the ILO was the Conference, not the Committee of Experts. Under article 37 of the ILO Constitution, only the International Court of Justice (ICJ) could give a definitive interpretation of international labour Conventions. The situation was exacerbated because General Surveys were important and were published and distributed worldwide without any prior approval by the Conference Committee. The fundamental Conventions were embedded in many international processes and instruments, such as the UN Global Compact, the OECD Guidelines for Multinational Enterprises and ISO 26000. The Employer members therefore objected in the strongest terms to the interpretation by the Committee of Experts of Convention No. 87 and the right to strike, to the use of the General Survey with regard to the right to strike and to being placed in such a position by the General Survey. They indicated that, to maintain the credibility and coherence of the Employers' group, their views and actions in all areas of ILO action relating to the Convention and the right to strike would be materially influenced.
83. In more general terms, the Employer members agreed with the comments of the Committee of Experts that, in the absence of a democratic system in which fundamental rights and principles were respected, freedom of association could not be fully developed. There were situations of the failure to apply Convention No. 87 outlined in the General Survey, such as the denial of the right to organize to certain categories of persons, restrictions on the holding of free elections in representative organizations, restrictions on the categories of persons who could hold office in organizations, restrictions on the

independence and functioning of organizations, the requirement of excessive numbers of members to establish organizations, which went to the heart of the Convention and were also experienced by some employers. Moreover, the Committee of Experts had rightly emphasized that employers were also protected by the freedom of association instruments.

84. An Employer member from Denmark noted that he represented public employers, although he did not represent the State, and that he wanted to comment on the impact of Conventions Nos 87 and 98 on public employers. The Committee of Experts had created arbitrary distinctions in interpreting the right to strike, which forced it to make special rules for the public sector. Public employers would not follow the creative inventions of the Committee of Experts, as the right to strike depended on national legislation, not on international ILO Conventions. The Committee of Experts' interpretation of Convention No. 98 was problematic in that it allowed minority unions to conclude agreements when no union comprised a majority of workers. While minority unions could negotiate agreements, Employers retained the right to refuse.
85. The Worker members, with reference to the remarks of the Employer members, reaffirmed that the right to strike was an indispensable corollary of freedom of association and was clearly derived from Convention No. 87. Moreover, the Committee of Experts had once again advanced a well thought-out argument on why the right to strike was quite properly part of fundamental labour rights. It was important to recall that the Committee of Experts was a technical body which followed the principles of independence, objectivity and impartiality. It would be wrong to think that it should modify its case law on the basis of a divergence of opinions among the constituents. While the mandate of the Committee of Experts did not include giving definitive interpretations of Conventions, for the purposes of legal security it nevertheless needed to examine the content and meaning of the provisions of Conventions and, where appropriate, to express its views in that regard.
86. The Worker members said that the right to strike was part of the ordinary exercise of freedom of association. Without that right, workers would not be in a position to exert any influence in collective bargaining. Questioning the right to strike as an integral part of freedom of association would mean that other rights and freedoms were meaningless in practice. The fundamental labour rights and their interpretation within the context of the supervisory process were essential elements in ensuring the durability of social rights and civil liberties.
87. The Worker member of Peru added that the right to strike was sacred, inalienable and non-negotiable and thousands of workers had lost their lives or suffered torture defending that right. The Worker member of Brazil said that the right to strike was as important as the right to work and the right to decent wages.
88. The Worker members welcomed the reference in the General Survey to their concerns on the direction taken by the case law of the European Court of Justice regarding the relationship between the right to strike and the free movement of services. They expressed pessimism concerning the so-called Monti II Regulation and noted that European case law was running counter, not just to the principles of freedom of association, but also to the right to collective bargaining. Although the Committee of Experts had noted that its mandate was limited to the shortcomings of member States and did not extend to regional organizations, national policy could not possibly be divorced entirely from regional policy. The question therefore arose as to whether the supervisory machinery should also cover problems at the regional level, and not only in Europe.
89. Several Worker members referred to restrictions on trade union rights in their countries. The Worker member of the United States indicated that, in the United States in 2011, the authorities in certain states had used budget deficits resulting from the financial crisis to

justify efforts to cut the wages and benefits of teachers and other public sector workers and to eliminate or restrict their collective bargaining rights. Employers in the United States were extremely hostile to trade unions and continued to use anti-union tactics to put workers under pressure not to join unions. In the context of continued high unemployment and weak economic growth, certain private sector employers had used lockouts to pressure workers to accept wage and benefit concessions, greater numbers of temporary workers and subcontracted work. It was also noted that in Senegal, civil service status, reserved for a minority, removed collective bargaining and consultation rights from workers, who were not therefore able to negotiate their pay. In the Republic of Korea, trade union law had recently been revised in a retrogressive manner. Workers who took the lead in union activities and collective action risked dismissal, imprisonment or lawsuits for the compensation of damage. Certain workers' confederations had been repeatedly threatened with the cancellation of their registration because of the high numbers of precarious workers in their membership, and when subcontracted workers tried to exercise the right to organize, the subcontract could be cancelled, which had the same effect as collective dismissal.

90. Several Government members recalled that the right to strike was well established and widely accepted as a fundamental right. The Government member of the United States expressed appreciation of the Committee of Experts for its continuing efforts to promote better understanding of the meaning and scope of the fundamental Conventions, including the right to strike. The Government member of Norway added that her country fully accepted the position of the Committee of Experts that the right to strike was a fundamental right protected under Convention No. 87.

Forced labour

91. The Employer members observed that Conventions Nos 29 and 105 remained extremely relevant and they welcomed the comprehensive information provided in the General Survey on their application in law and practice. However, there was no room for complacency, as problems still existed, particularly in terms of a lack of commitment to taking effective action for the elimination of forced labour and the mechanisms for the enforcement of its prohibition. Moreover, the Employer members noted a tendency in the General Survey to expand the definitions of forced labour to new areas, such as prison labour and overtime. They warned that such extensions ran the risk of inadvertently trivializing the problem. In the case of prison labour, they expressed the view that the definition provided by the Committee of Experts of the notion of voluntariness was too narrow. Moreover, while an approximation to a free labour relationship could be an indicator of an absence of forced labour in those circumstances, there were other viable indicators. It would probably be advisable to define more closely the limits of voluntariness. In relation to overtime, it should be emphasized that, although excessive overtime hours did not constitute decent work, nor did they amount to forced labour if the worker was free to leave the employment relationship. With reference to the prohibition by Convention No. 105 of forced labour as a punishment for having participated in strikes, they added that the Convention was not an instrument for regulating strikes, nor did it prohibit sanctions for strikes, but only the exaction of forced labour as a sanction for having participated in strikes, whether or not the strikes were legal.
92. The Worker members said that forced labour, which was the antithesis of decent work, was not limited to certain countries or sectors, but was to be found throughout the world in such forms as human trafficking, new forms of migration, the privatization of prisons, and even in the progress of "quid pro quo" social security policies (under which workers who were unemployed or living in poverty had to perform work of public interest in exchange for their benefits).

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132. The Committee regretted that, despite the invitations, the governments of the following States failed to take part in the discussions concerning their countries and the fulfilment of their constitutional obligations to report: **Bahamas, Barbados, Belize, Burundi, Comoros, Côte d'Ivoire, Democratic Republic of the Congo, Djibouti, Dominica, Equatorial Guinea, Fiji, Georgia, Grenada, Guinea-Bissau, Haiti, Iraq, Kazakhstan, Kiribati, Kyrgyzstan, Libya, Mongolia, Mozambique, Rwanda, Saint Lucia, Samoa, San Marino, Sao Tome and Principe, Sierra Leone, Slovakia, Solomon Islands, Somalia, Tajikistan, Turkmenistan, United Kingdom (St Helena) and Vanuatu.** The Committee decided to mention the cases of all these States in the appropriate paragraphs of its report and to inform them in accordance with the usual practice.
133. The Committee noted with regret that the governments of the States which were not represented at the Conference, namely: **Bahamas, Belize, Dominica, Equatorial Guinea, Grenada, Guinea-Bissau, Saint Lucia, Samoa, Somalia and Vanuatu** were unable to participate in the Committee's examination of the cases relating to them. It decided to mention these countries in the appropriate paragraphs of this report and to inform the governments, in accordance with the usual practice.

E. Discussion of the list of individual cases to be considered by the Committee

134. With regard to the adoption of the list of individual cases for discussion by the Committee in the second week, the Worker members emphasized the fact that only the Workers and the Government representatives were present at the sitting on Friday, 1 June 2012, after 8.30 p.m. They wished to provide some explanation regarding the attempts made in reaching an agreement on a list of 25 individual cases. Unfortunately this had not been possible, since the conditions put forward by the Employer members were unacceptable. The Worker members considered that it was not their responsibility to explain those conditions. As to the substance of the matter, the issue raised by the Employer members was identical to the one that they had referred to previously, namely that the Committee of Experts had taken the initiative to provide explanations concerning the right to strike in the General Survey, and that was something that the Employer members could not accept. The Worker members considered, however, that the Committee of Experts worked in complete autonomy. As the Committee of Experts had emphasized in its annual report, it was "an independent body composed of legal experts charged with examining the application of ILO Conventions and Recommendations by ILO member States". It was not possible to assess its independence in a different manner than had previously been done. The fact was that it had not been possible to reach consensus between the Employer members and the Worker members. The Worker members would have liked to propose a list including cases to which they attached particular importance and which raised serious issues for the workers of the countries concerned. It had unfortunately proven impossible to reach an agreement with the Employer members regarding such a list. The Worker members deplored the situation because it showed that tripartism and social dialogue did not always enable positive and constructive solutions to be found. Consequently, they had looked for a practical solution to this impasse and had proposed a "default list", in other words a list drawn up in the absence of one negotiated and approved by the groups. They had proposed starting with the examination of the double footnoted cases, following the French alphabetical order from the letter K onwards: Mauritania (Convention No. 81); Dominican Republic (Convention No. 111); Senegal (Convention No. 182); Fiji (Convention No. 87); and Guatemala (Convention No. 87). The Worker members had also proposed to examine 20 cases following the same alphabetical order on the basis of the preliminary list. The Worker members reaffirmed that this list was not the one they would have preferred and that it was a "default list". They expressed the wish to have the possibility of making other comments at the start of the examination of individual cases. In conclusion, the Worker

members emphasized the fact that they had not created this situation. They felt that they were victims of a situation which had been shaped by others, one in which they had not played an active role.

135. The Chairperson invited the Government members to make comments regarding the statement of the Worker members and the situation faced by the Committee.
136. The Government member of Zimbabwe informed the Committee that it would not be appearing before the Committee in the case of a “default list”.
137. The Government member of the United States stated that she was beyond disappointment and foresaw that many other governments would wish to make statements at a later stage. She wondered whether the fact that the Employer members were no longer present in the room, meant that they would not participate in the discussion of a “default list”.
138. The Government member of Brazil, speaking on behalf of GRULAC, expressed his deep frustration about the whole situation, which was offensive and disrespectful to governments. He recalled the statements that had been previously made by the Government group and GRULAC underlining the importance of having a list of individual cases on time, and considered that still not having such a list severely hampered the constitutional functions of the ILO.
139. The Government member of Greece supported the statement made by the Government member of Brazil and, noting that the Employer members were not present, requested indications from the Office on the way forward.
140. The Worker members requested clarifications regarding the manner in which the outcome of the Committee’s discussion would be reported to the Recurrent Item Committee. In the absence of joint conclusions, the groups could consider submitting their conclusions separately.
141. The representative of the Secretary-General in reply to the various questions raised, indicated that the Office had first to reflect on possible ways forward. In the afternoon, the Committee had agreed on the brief summary of the discussion on the General Survey. The revised version of this document (document D.8(Rev.), which included the comments made by the Worker and Employer Vice-Chairpersons, would be communicated to the Recurrent Item Committee on Saturday afternoon, 3 June 2012. The Committee had not agreed on a proposed outcome but it was already scheduled in the programme that the Officers would brief the Recurrent Item Committee on the outcome. The Office had not been informed that the Employer members would leave the room and had been taken by surprise. The Government members had been extremely patient and she thanked them for this, as well as for their respect for the institution.
142. On Saturday afternoon, with regard to the ongoing efforts to prepare a mutually agreeable list of cases, the Chairperson announced that he had taken the initiative to convene an informal meeting with all regional coordinators and the Vice-Chairpersons but unfortunately this meeting had produced no results. He also indicated that the different questions put forward by several Government members regarding the manner in which the Committee would proceed with its work would be answered at the Committee’s next sitting on Monday, 4 June.
143. The Government of Brazil, speaking on behalf of GRULAC, said that they had held a meeting at which GRULAC reiterated its commitment to the supervisory system but noted that once again the list of individual cases was not ready in time. He repeated the group’s view that the fact that the list was not ready was offensive and disrespectful vis-à-vis the

governments. Its position was therefore that, if no list was presented before the end of the day (and he was referring to a complete list), then the group did not want any list at all. The situation that had arisen showed that the procedures needed to be reviewed by the Governing Body. He concluded by reiterating GRULAC's firm support for the respect of the plan of work and for the position of the Government group.

- 144.** On Monday, 4 June 2012, the Employer and Worker members, as well as several Government members, made the following statements.
- 145.** The Employer members provided the following explanations concerning the situation that had arisen with regard to the list of cases. In relation to the interpretation of the right to strike, they referred to the publication of the Committee of Experts' General Survey on the eight ILO fundamental Conventions in advance of the 101st Session of the International Labour Conference. The General Survey was a guide to the Conference Committee to assist it with its work when supervising the application of ratified labour standards by member States of the ILO. The General Survey, like the report of the Committee of Experts, was not an agreed or authoritative text of the ILO tripartite constituents, namely, the Governments, Employers and Workers. Outside of the ILO, this important distinction was either misunderstood or forgotten and General Surveys were seen as being the position of the ILO, which they were not. The Employer members had, for many years, consistently stated this position concerning General Surveys and the reports of the Committee of Experts. The role of the International Labour Office was to serve its tripartite constituents to the best of its abilities. The ILO was the Governments, Workers and Employers. Both the General Survey and the report of the Committee of Experts were created with the assistance of the International Labour Office. The Governments, Employers and Workers were not involved in their creation or publication. The first opportunity for the Governments, Employers and Workers to consider these publications as groups was at the International Labour Conference.
- 146.** The eight fundamental Conventions were important not only within the ILO, but also because other international institutions regularly used them in their activities. The fundamental Conventions were embedded in the UN Global Compact, the OECD Guidelines for Multinational Enterprises, and the UN Human Rights Council's "Protect, Respect and Remedy" framework. The ILO's supervisory machinery related to member States only, not to businesses, so it was vital that, when other international institutions used the fundamental Conventions, such use was correct. A correct understanding of the fundamental Conventions was imperative for businesses because they were used in international framework agreements, transnational company agreements and in European framework agreements with global trade unions, where they were often not defined. Accordingly, that year's General Survey had particular contextual importance for the Employer members. Within the General Survey, the commentary on Convention No. 87 concerning freedom of association included interpretations by the Committee of Experts on the exercise of the right to strike.
- 147.** Interpretations of a right to strike by the Committee of Experts were fundamentally unacceptable to the Employer members. The Employer members stated that they had made it clear last week to the Conference Committee that they were of the view that the Committee of Experts' position regarding the right to strike outlined in that year's General Survey did not reflect the views of the Employer and Worker members in the Conference Committee. The Employers' group had a long-held policy position in the ILO on this matter. They had repeatedly expressed their opposition to any attempt by the Committee of Experts to interpret the ways by which the right to strike, where it was recognized in national law, could be exercised. This issue was complicated by the fact that Convention No. 87 itself was silent on the right to strike and, in the view of the Employer members, was therefore not an issue upon which the Committee of Experts should express any

opinion. The mandate of the Committee of Experts was to comment on the application of Convention No. 87 and not to interpret a right to strike into Convention No. 87. The General Survey was simply meant to be used by the Conference Committee to inform its work, leaving it for the tripartite constituents to determine, where consensus existed, the position of the ILO, with regard to the supervision of Conventions. Further, under article 37 of the ILO Constitution, only the ICJ could give a definitive interpretation of international labour Conventions. If the Constitution were to be applied, given the absence of any reference to a right to strike in the actual text of Convention No. 87, then internationally accepted rules of interpretation required Convention No. 87 to be interpreted without a right to strike. In addition, it should be noted that the principle of freedom of association contained in Convention No. 87 had a separate supervisory procedure: namely the Committee on Freedom of Association (CFA). The Employer members had also objected for many years about the use of CFA cases by the Committee of Experts when examining Convention No. 87, the use of CFA cases when interpreting the right to strike, and the use of the Committee of Experts' interpretations of the right to strike in the CFA. The Employer members were critical of the confusion and lack of certainty that the supervisory system created.

148. In the view of the Employer members, Convention No. 87 cases that concerned a nationally recognized right to strike should only be supervised by the CFA only in order to ensure certainty and coherence. They objected to any view that the Committee of Experts' interpretations of the right to strike were legal jurisprudence, as the Committee of Experts did not have a judicial mandate within the ILO. The Committee of Experts did not have a determinative role within the ILO supervisory machinery. The Committee of Experts did not supervise labour standards; rather the ILO tripartite constituents did. Referring their interpretations of the right to strike within Convention No. 87 to the ICJ was therefore inappropriate. The CFA produced recommendations to the Governing Body for adoption. The Governing Body did not have a judicial role either; it also did not supervise labour standards. For the same reason, referring the CFA recommendations to the ICJ was also inappropriate.
149. The interpretation of the right to strike was important because the Employer members asserted that it was for national governments to establish their own rules/practices concerning the right to strike when considering how to resolve national breakdowns in industrial relations. It was important in the context of the international human rights debate that a correct use of Convention No. 87 was made, because an incorrect inclusion of the right to strike risked the Committee of Experts' interpretation of the right to strike becoming an internationally accepted human right to strike, which would restrict the ability of national governments to define their right to strike. This restricted the role of governments in, for example, the circumstances when a lawful strike could be called and the definition of essential services. This was unacceptable to the Employer members. There was no legal requirement for governments that had ratified Convention No. 87 to address the Committee of Experts' interpretation of the right to strike. The Employer members could not agree to the Committee of Experts' interpretation of the right to strike because of the risk that it would be misused.
150. Regarding this year's Conference, the Employer members stated that, given their longstanding objections to the Committee of Experts' interpretation of the right to strike, they sought to clarify the mandate of the Committee of Experts with regard to the General Survey. They brought this important issue to the attention of the Worker members and, together, they had negotiated and formulated the following draft clarification: "The General Survey is part of the regular supervisory process and is the result of the Committee of Experts' analysis. It is not an agreed or determinative text of the ILO tripartite constituents." The Employer members' proposal was that the International Labour Office would be instructed to immediately insert the clarification in future hard copy and ILO

website publications of this year's General Survey and the report of the Committee of Experts. It was not possible to simply remove the Committee of Experts' interpretations as the International Labour Office had already published the General Survey containing the Committee of Experts' interpretation of the right to strike. They had made it clear that without the abovementioned clarification in respect to the General Survey, in order for the Employer members' consideration of the cases in the Committee to be coherent, they could not accept the supervision of Convention No. 87 cases that included interpretations by the Committee of Experts regarding the right to strike. After much confidential negotiation with the Worker members, regrettably, those negotiations had irretrievably broken down. The Employer members considered, in this connection, that it was inappropriate to lift the veil on those negotiations, as they were and remained of a confidential nature.

- 151.** The Employer members highlighted that on Friday, 1 June 2012, after the negotiations had irretrievably broken down, the Employer Vice-Chairperson returned to the Committee room, as he was informed that the Worker Vice-Chairperson had done so. His position was that the negotiations had failed so there was confusion concerning why it was necessary to return to the Committee room. During the period he was in the room, he observed officials of the International Labour Office in discussions with Worker and Government members of the Committee. It was important to be aware that Employer members had made it clear that the list of cases to be supervised could only be agreed in direct negotiation with the Worker members. The Government members could not be involved as they had a conflict of national interest. The International Labour Office could not be involved as it was not an ILO constituent and had to be impartial. Members of the Employers' group had been waiting in the Committee room from 5 p.m. awaiting confirmation concerning the negotiations. The Employer Vice-Chairperson informed the Employer members that the negotiations had failed. At 8.31 p.m., when the meeting was 91 minutes past its scheduled close of 7 p.m., as no one from the International Labour Office had communicated to him what was happening, he had then informed the Deputy Director of the International Labour Standards Department that the Employer members were leaving the Committee room for the evening. The Employer members had then left. There had been no meeting of the Conference Committee occurring at the time so it had not been a walk-out. The Employer members had left the room after the scheduled close and while private meetings involving others had been happening, of which the Employer members had known nothing about. Many other delegates had either left or were leaving. The Employer members had attended the next scheduled meeting.
- 152.** On Saturday, 2 June 2012, following a request from the Government regional coordinators for an informal meeting with the Employer and Worker Vice-Chairpersons, the Employer Vice-Chairperson had attended the informal meeting and explained that he would not negotiate a list of cases with the involvement of the Government members. He had confirmed that he would provide a statement of the Employer members' position with regard to the failed negotiations for a list of cases.
- 153.** The Employer members then proposed a possible way forward for the Conference Committee, and formulated the following suggestions:
- The Employer members remained supportive of the application of labour standards provided there was respect for genuine tripartism of the ILO constituents.
 - The proposed clarification to clearly appear in all International Labour Office and Committee of Experts documentation prepared for a debate and discussion by the International Labour Conference or the Governing Body.

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- An urgent review of the working methods and mandate of the international labour standards supervisory system (including its interaction with other areas of the ILO), including the Committee of Experts, the Conference Committee and the International Labour Office, was required.
 - The Employer and Worker Vice-Chairpersons to meet with the Committee of Experts before they started their work each year and for the Committee of Experts to have far greater interaction with employers' and workers' bureaux within the ILO in order to strengthen cooperation and governance. The Committee of Experts should have a tripartite agreed framework in which to do its work. In past years, the Employer members had proposed changes to the format of reports of the Committee of Experts with a view to have tripartite views better reflected. More precisely, the Employer members proposed that there should be possibilities for Employers, Workers and Governments to set out in the reports of the Committee of Experts their views on standards supervision-related issues, including on the application and interpretation of particular Conventions.
 - An urgent review of the International Labour Standards Department of the International Labour Office was required. The role of ILO officials required respect for the tripartism and impartiality in their work. Their role was to support and facilitate the work of the ILO tripartite constituents, which required neutrality and balance. It required staffing with politically neutral international civil servants that supported the work of the Committee of Experts, not the Committee of Experts supporting the work of the Office. Neutrality would help create mature and respectful international industrial relations between the Governments, Employers and Workers.
 - Respect for the relationships with other international agencies to ensure that the views of the ILO were those of the tripartite constituents.
- 154.** In conclusion, the Employer members stated that the ILO was now facing a multifaceted crisis concerning the interpretation of the right to strike in connection with Convention No. 87. It was not acceptable for anyone to be confused or misled as to the true status of any ILO text simply because it bore its logo or was silent as to its proper status. This was now more than just an issue involving the General Survey as it affected the Convention No. 87 cases to be supervised in the Conference Committee. The absence of an express right to strike in Convention No. 87 meant that the Committee of Experts was effectively making policy, which was outside of their mandate. Policy-making was the exclusive domain of the Governments, Employers and Workers. The Committee of Experts could advise on application, not determine application on behalf of the ILO and certainly not determine new rights and obligations regarding a right to strike within Convention No. 87. It was important that all Governments, Employers and Workers alerted their constituents and relevant authorities as to the true status of the Committee of Experts' interpretation of the right to strike.
- 155.** The Worker members emphasized that the situation seen today had never before been experienced in the history of the Committee on the Application of Standards. They added that the present statement was the outcome of long discussions in the Workers' group of the Committee which, alarmed by the course of events, had called for a statement that was clear and strong, but nevertheless constructive. In the view of the Worker members, the Committee needed to proceed with its work and the cases should be discussed without delay, as requested vigorously by the Government members present on Friday evening and Saturday afternoon.

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- 156.** The Worker members said that a rereading of the records of the Committee for previous years showed that for a few years the issue of the choice of individual cases had become a very difficult exercise, and not only in view of developments in the political and economic situation in many member States. Considerations related to the supervisory machinery itself had been raised by the Employer members, who had started to express the wish to weaken the supervisory methods in 2010. Yet, in 2009, the spokesperson for the Employers' group had indicated the following: "The Employer members pointed out that the participation of the Chairperson of the Committee of Experts in the work of the Committee reflected the essential fact-finding role of the Committee of Experts in relation to the work of the Conference Committee. Without the help of the Committee of Experts, this Committee could not function." (*Record of Proceedings* No. 16, paragraph 42). This was clearly true and, as recalled the previous Friday by Mr Yokota, Chairperson of the Committee of Experts, the Committee of Experts took everything into account when drawing up its reports. It had a global vision of the information provided and on that basis it carried out an analysis of law and practice.
- 157.** The Worker members emphasized that in 2010 the Employer members had mounted a first major challenge against a large number of principles that were commonly accepted and recognized as guarantees of the Committee's work as a supervisory body of the application of ratified ILO Conventions. The Employer members had clearly indicated, on several occasions, that in their view the tripartite governance of the supervision of the application of standards was compromised, or at least that there was a faulty line in this process of tripartite governance.
- 158.** The Worker members had emphasized in 2011 that the list had to be drawn up together, that is with the Employer members, and that it was together that they had to reach a compromise, as a veto had no place in the process, either directly (by rejecting a particular country) or indirectly (by establishing restrictive rules). They had specified that the rule could not be that one of the parties always had to give way, and it was to be regretted that methods of work based on consensus were increasingly difficult to achieve.
- 159.** The Worker members affirmed that this year they had been very brutally confronted by the fact that the Employer members were contesting the mandate of the Committee of Experts, essentially in relation to the interpretation of the right to strike under Convention No. 87. It should be clarified that that this challenge to the General Survey and the mandate of the Committee of Experts only came from the Employer members, who had no right to make comments in the name of this Committee against the supervisory system. The direct consequence had been that an explicit veto had been expressed in relation to the possible examination of individual cases in which the right to strike might be raised during the discussion.
- 160.** The Worker members considered that the confrontation had been brutal for the following reasons. As happened every year, significant preparatory work had been carried out within the Workers' group. The preparatory work was carried out seriously because, for the Worker members, the discussion of the most serious individual cases at the Conference was a unique occasion. It was the only time that they could describe openly and without fear the numerous violations of the rights accorded to them by ILO standards. The report of the Committee of Experts had been published on 28 February 2012. The General Survey had been published on the same date. The electronic versions of those documents had been published on the Web on 2 March 2012. Yet, during the 313th Session of the Governing Body, held in March 2012, the Employers had not at any time given an indication of any possible criticisms concerning the role of the Committee of Experts, nor on it exceeding its mandate in its interpretation of the right to strike. It had only been on Friday, 1 June 2012, during the discussion of the General Report, that the Employer members had clearly indicated, in the context of the present Committee, their vision on this divergence of views.

However, based on the published reports, the preparatory work of the Workers' group had commenced in March 2012 in regional coordination meetings, and then in an international meeting held in Brussels on 2 April. It had culminated in May in a series of open, frank and sincere confidence building contacts with the spokesperson of the Employer members of the Committee. On that occasion, without any reservations, he had put forward his group's list of cases, with no comment on the mandate of the Committee of Experts, or on any reservations concerning the discussion of Convention No. 87. A preliminary list of 49 cases had accordingly been drawn up and forwarded by the ILO to governments on 8 May 2012.

161. In the Worker members' view of the approach to the work of supervising the application of standards, they considered very sincerely that the contribution of the Employers' group, through their spokesperson, who had made suggestions for cases to be included in the provisional list, had meant that preparatory work similar to that of the Workers' group had been undertaken. That was particularly the case as it was known that the list was to be forwarded to governments.
162. The Worker members were very willing to recognize that in certain countries the rights of employers were also violated and that the Employer members valued more technical subjects. Clearly, there was no obligation to engage in preparatory work, as understood by the Worker members. Each group was free to organize its own work. However, taking the supervisory machinery seriously required preparatory work, for the members themselves and for those involved in the discussion process. That was why the Worker members were certain that they could work constructively as soon as they arrived at the Conference. They had never imagined that the drawing up of a final list of 25 cases to be discussed in the Committee would be as dramatic as it had been this year. They had never thought that they would be driven to make the proposal that they had put forward on Friday evening.
163. The Worker members emphasized that their objective had clearly been to come together and, on a basis of consensus, to place emphasis on the most serious cases and to give a very clear signal to the governments on the list concerning the serious nature of their failings. It was clear that coming up with a preliminary list of 49 cases had already been very frustrating for many Worker members present in the Committee. Even though they had understood that the case concerning their government would not be raised, many colleagues had nevertheless made the journey to the Conference in Geneva, which was the only forum in which their voices could be heard and where they could participate effectively in the discussions.
164. The Worker members recalled that, as indicated by the Worker member of Colombia on Friday: the process of drawing up the final list of cases had always been difficult, but the list was not a spoil of war and did not require the taking of hostages, that wisdom always prevailed and that an agreed list would certainly be presented to governments. Many of the Workers' group still expected such consensus, as a serious political indication of continued belief in social dialogue, the functioning of the ILO supervisory procedures and therefore in its standards.
165. The Worker members said that they had gained the impression that, for the Employer members, the present session of the Committee on the Application of Standards had already ended, that everything would return to normal tomorrow and that in 2013 work would continue as if nothing had happened. However, reflection would be required on the way forward. The Employer members had put forward proposals, but that was the task of the Governing Body, which would have to consider the latest events without delay, as the Conference Committee was not the place to discuss them. Being made aware of them before the Conference would have made it possible for the Committee to go ahead with its supervisory work, instead of creating a crisis situation that was prejudicial to everyone.

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- 166.** The Worker members stated that, more than anyone, they wanted to come through the storm. Employers needed workers and their representatives, and should not forget that. Without social peace, without counterparts, it would be the law of the jungle and no longer a question of productivity or growth. The Worker members wondered whether the intention was to override the social pacts which governed industrial relations in many countries.
- 167.** The Worker members emphasized that governments were shocked, which was understandable. But the Worker members were also shocked and were the losers: because they had played by the rules of the game and, as early as March, certain colleagues had already given up the hope of seeing their situation discussed out of solidarity with other colleagues, to whom they had given priority; because they had been taken hostage in a so-called struggle between the Employer members and the Committee of Experts; because the discussion of the role of the Committee of Experts and its competence to give an interpretation of the right to strike did not lie with the Committee on the Application of Standards, but with the Governing Body; because, as a result of the sabotage of the supervisory machinery, it was the rights of workers that were being disregarded; and because workers and their families were the primary victims of the fact that the serious situations that they were experiencing could not be discussed.
- 168.** The Worker members raised the question of what the Employer members wished to gain through this strategy that had been developed over time, and certainly since the Committee's work in 2010. On that occasion, the Worker members had already had to react to the same attacks as those reiterated on this occasion, without warning, at the beginning of the Committee's work. The Worker members wondered if the Employer members were seeking to finish the Committee of Experts, and if the Committee on Freedom of Association would be the next victim. Yet it should be recalled that those bodies were appointed through a tripartite procedure.
- 169.** The Worker members recalled that, on Friday evening, in the absence of a negotiated list, at the risk of shocking many Worker colleagues present in the room, the Worker Vice-Chairperson had had to make a proposal to the Committee. That had been done for the benefit only of the Government members, as the Employer members had left the room without warning, even though the Chairperson had not adjourned the sitting. There had been no negotiated list because the conditions that had been imposed by the Employer members upon the Worker members were unacceptable. In the absence of a final list, the Worker Vice-Chairperson had therefore proposed that 25 cases should be discussed from the long list forwarded to governments on 8 May. A first group would be composed of the five cases with double footnotes. A second group would be made up of 20 cases taken from the long list, starting from the letter K and following the French alphabetical order. This proposal was based on the working methods that had been agreed to in document D.1. The selected method for drawing up the list, based on the pure logic of the French alphabetical order, had been and remained a very delicate matter. It should however be recalled that the list, whether long or short, was one of the elements of the supervisory system itself since, through the list, a clear signal was sent to governments that the situation of non-compliance with ILO Conventions could not continue on their territory. Inclusion on the long list was an indication that pressure was mounting and that the international community was aware of the gravity of the situation of disregard for workers' rights. It had been the only solution to go forward with dignity.
- 170.** Following those explanations, the Worker members wished to put on record that what was occurring in the Committee was not their will. At no time had there been agreement on the list, as some were trying to make people believe. At no time had the Worker members broken off the dialogue or acted in bad faith. The Worker members were in no way responsible for the challenges raised by the Employer members concerning the role of the

Committee of Experts and their authority to interpret the links between Convention No. 87 and the right to strike. Moreover, they did not support such a challenge. The Worker members had not been informed of those types of arguments before the Conference, during the Governing Body in March, nor during the contacts to draw up the preliminary list, or at any other time or by any means.

171. The Worker members concluded that the imposition was not acceptable of such purely exorbitant conditions which went beyond the competence of this Committee, as they were of a political nature. They could not accept such arbitrary edicts based on factors over which, within the Committee, they had no power and which would have the consequence that the cases selected in May might never be discussed. All of that was to be regretted and gave rise to immense wastage: many trade unions and employers' organizations invested time and money in the work of the Committee, as did governments. They could not be sent home empty-handed. The wastage was particularly incomprehensible in view of the calls made by the Employer members for the ILO to make greater savings. The Worker members called on all parties to exercise wisdom and remained open to any solution that was approved and obtained through constructive negotiation.
172. The Government member of Sudan, speaking on behalf of the Government members, regretted that there was no list of individual cases to be discussed at the Committee on the Application of Standards. He considered that a further discussion on the substantive issues raised by the Employer and Worker members had to take place in an appropriate forum. The speaker also considered that this situation clearly showed that there was a need to review the working methods of this Committee.
173. The Government member of Pakistan, speaking on behalf of the Asia and Pacific group (ASPAG), stated that his group valued very much the supervisory mechanism for promoting and supervising ILO standards. For many years, through this system, the governments had received necessary guidance from the social partners that had helped them to overcome challenges in realizing ILO's fundamental principles and values at work. At the same time, governments also felt the need to further streamline the system to make it efficient and fair. They felt that there was a need to establish criteria that allowed the selection of cases by the social partners in a more objective and timely manner. Such a reform would certainly help not only to bring transparency but also to establish sanctity and efficacy of this supervisory system. He indicated that as a result of last year's events and developments during the proceedings of the Committee this year, such reform was inevitable and had to be given priority. At the same time, ASPAG felt that unnecessary delay in the finalization of the list of individual cases this year had caused immense inconvenience for governments. ASPAG therefore called for this particular issue to be addressed before handling individual cases in the Committee on the Application of Standards in the future.
174. The Government member of Niger, speaking on behalf of the Africa group, supported the analysis by the Government group of the absence of the list of individual cases and felt that this regrettable situation highlighted the need to review the working methods for the preparation of the list of cases, which needed more transparency and objective criteria. The current situation should lead to urgent reflection on the revision of the whole of the supervisory system for international labour standards. In the future, it would be essential to communicate the list of individual cases well before the start of the work of the Conference in order to enable the governments to prepare their replies. Lastly, in view of this year's delay, no list could be objectively examined during the current session of the Committee.
175. The Government member of Brazil, speaking on behalf of GRULAC, stated that GRULAC had always been consistent in its position. Since July 2011, the group had been stating that any repetition of the events that had occurred in the Committee at the 100th Session of the

Conference should be avoided and that the list should be published in accordance with the plan of work, on the second day of the Committee's session. This request, that deadlines be respected, was repeated at the Governing Body in both November 2011 and March 2012. GRULAC had shown some flexibility regarding the publication of the list on the third day of the Committee's session, at the latest. On the fourth day of the Committee, in a display of goodwill and flexibility, it had asked for the list to be published that day at the latest. The group had shown consistency in its position and its commitment towards the ILO supervisory system and the constitutional mandate of the Committee. It considered that the current situation was totally unacceptable and stated that there was a need to review the Committee's procedures. The current degree of uncertainty was having a damaging effect on its credibility. The preparation of the list was a prerogative of the social partners. As with any prerogative, it had to be exercised with responsibility and with respect towards governments. These procedures had shown a lack of respect towards governments once again, since they had had no time to prepare or to participate in debates. In conclusion, the speaker reiterated the need for respecting the deadline for the publication of the list and for modifying the Committee's procedures with a view to improving objectivity and transparency and ensuring greater respect for the Government members.

176. The Government member of the United States, speaking on behalf of IMEC, indicated that at the opening sitting of the Committee, IMEC had joined in a unified call by the Government group for prompt adoption of the list of individual country cases. The subsequent deadlock that had prevented the adoption of a list was totally without precedent in the 85-year history of the Committee. It was both disappointing and distressing.
177. It was the firm, long-standing position of IMEC that the governments should not get involved in the development of the list of cases. This position had not changed. For the record, there had been no involvement of governments in the negotiations of the list of cases, and at no time did the governments request to be part of them. The Conference would need to understand that this problem had not been caused by governments.
178. Although governments did not participate in developing the list of cases, they were a key component of this Committee. Governments ratified and implemented Conventions, and then agreed to discuss issues of compliance with the Workers and Employers' groups at the International Labour Conference. The situation at this Conference had put governments in an extremely difficult position, and IMEC regretted that at times there was a distinct lack of courtesy shown towards them.
179. It was the prerogative of the social partners to agree to a final list of individual country cases. While the social partners had the right to agree on the criteria for the list, IMEC did not believe that it was appropriate for the Employer and the Worker members to make agreement on a list conditional upon external issues on which governments had a role in the discussion and decision-making process.
180. It was IMEC's view that the role of the Committee on the Application of Standards was to consider the Experts' report on individual cases, and not to question the status of that report. The issues that had been raised by the Employer members needed to be dealt with in an appropriate forum, but IMEC did not consider that the Committee on the Application of Standards was the appropriate one, and wished to request the ILO Legal Adviser to explain the available options.
181. There were a number of reasons why IMEC was deeply distressed about the failure of the social partners to adopt a list of individual country cases. First, the failure to adopt a list of cases had prevented this Committee from executing the critically important work of supervising countries in the application of labour standards as required by the ILO Constitution and previous decisions of the International Labour Conference. Secondly, the

ILO supervisory system was unique and was an essential element of the Organization's mandate and mission. The ILO supervisory mechanisms had long been cited as the most advanced and best functioning of the international system. Not only did the present situation reflect poorly on the Committee, but also it had serious ramifications for the ILO supervisory system as a whole, and risked irreparable damage to the credibility of the entire Organization.

182. IMEC had a long history of supporting the independence, impartiality and objectivity of the Committee of Experts, as well as its autonomy. The group could understand that there would be occasions when members or groups within the Committee on the Application of Standards would have views that differed from those of the Committee of Experts, and all members had the fundamental right to express those views. However, it was regrettable that the events of the past few days had resulted in a situation that potentially had put the credibility of the ILO and the supervisory system in jeopardy.
183. The question at this point was where this Committee would go. In this connection, IMEC was encouraged that, in the previous week, the Chairperson of the Committee of Experts specifically indicated in his presentation to this Committee a willingness to continue constructive dialogue with this Committee on issues that were at the heart of this present conflict. In addition, the question on the right to strike within the context of Convention No. 87 was a long-standing issue which had not been resolved through tripartite dialogue to date. IMEC noted that article 37 of the ILO Constitution provided that legal clarification on such questions could be sought from the ICJ.
184. The speaker concluded by stating that governments needed to be involved in discussions and decisions on issues other than the negotiation of the list, and in this regard, IMEC welcomed the opportunity to work with the social partners to resolve the concerns raised by the Employer members. IMEC wished to reiterate its strong commitment to the ILO supervisory system and the role of the Committee on the Application of Standards. It was also committed to moving forward in a positive, constructive manner in the spirit of tripartism.
185. The Employer members stated that regretfully, from this point forward, they were working on the basis that there would not be a list of individual cases this year. They also agreed that there was a need for further discussions with regard to the issues that had been raised. They recalled that the International Labour Conference was the supreme body of the ILO and it was for that body to find a solution and that the matter should not be referred to the Governing Body. There was a clear need to agree on the working methods of this Committee and reforms were necessary. Moreover, they insisted on the fact that the behaviour, actions and negotiations of the Employer members had been done in good faith. They reiterated that the Employer members had always intended to respect the governments' time frames, and that the continued negotiations, which had extended past the intended deadline of Thursday afternoon, were not meant to cause any discourtesy to governments. When discussing the working methods, consideration should be given to communication in view of the size of this Committee. Finally, they reiterated that they still had a strong commitment to the Conference Committee and to genuine tripartism.
186. The Worker members emphasized the fact that they could not agree to the inclusion of a disclaimer in the General Survey, which was the result of analyses undertaken by the Committee of Experts. The Worker members considered that it was not the place of the Committee on the Application of Standards and certainly not the Employer members and Worker members alone to discuss such a disclaimer as a discussion of this kind fell within the competence of all ILO constituents. This approach had been confirmed by many governments. Nevertheless, without taking this into account, the Employer members continued to insist on the insertion of such a disclaimer. The Worker members might

eventually agree to a joint statement on the divergence of views on the role and mandate of the Committee of Experts. They could thus envisage discussing this divergence of views where it should be discussed, namely in the Governing Body. It would therefore be the responsibility of the Governing Body to develop a plan to address the subject. The ILO Constitution also provided for the competence of the ICJ for the interpretation of Conventions. The Worker members regretted enormously that the Employer members could not agree to such an approach. They concluded that genuine tripartite social dialogue could not take place within a situation of deadlock.

The reply of the representative of the Secretary-General

- 187.** The representative of the Secretary-General, in response to the comments made by the Employers members, confirmed that the Committee on the Application of Standards had never faced a situation like the current one since its creation in 1926. The Committee was the apex of the supervisory mechanism under a constitutional mandate, but, this year, it had completed its work only partially, having performed its mandate under article 19 of the ILO Constitution, but having failed to do so with respect to article 22 of the Constitution.
- 188.** The International Labour Standards Department had provided its support to the supervisory system, and would continue to do so in total neutrality, balance and impartiality. The Office was governed by article 9 of the ILO Constitution, the Staff Regulations of the Office and the Standards of Conduct of the International Civil Service. Article 9 of the Constitution provided that in the performance of their duties, the staff was required not to seek or receive instructions from any government or other authority external to the Organization. Article 1.1 and 1.4 of the Staff Regulations required all officials not to seek or accept instructions in regard to the performance of their duties from any government or other authority external to the International Labour Office. They had to be subject to the authority of the Director-General and had to be responsible to him in the exercise of their functions. It was recalled that the work of the International Labour Standards Department had never been questioned to date by any official bodies of the Organization. On the contrary, it had been congratulated on numerous occasions by all the supervisory bodies, including the groups of the Conference Committee in the past.
- 189.** She indicated that it was clear that the principles and recommendations of the Committee of Experts, the Committee on Freedom of Association, and the recommendations of the Conference Committee were views and recommendations, and were accordingly not binding. However, they had enormous moral authority. International labour Conventions and Recommendations clearly had more legal authority than any recommendations by a supervisory body.
- 190.** The principles on the right to strike of the Committee of Experts had a tripartite origin: the Committee on Freedom of Association. It was difficult to understand how these principles could be contested within the framework of the Committee of Experts, but accepted in the context of the Committee on Freedom of Association. She then referred to a publication entitled *Employers' organizations and the ILO supervisory machinery*, a joint publication by the International Labour Standards Department and the International Training Centre in Turin in cooperation with the Bureau for Employers' Activities, which had been signed by the Secretary-General of the International Organisation of Employers (IOE), the Director of the Bureau for Employers' Activities and by the Director of the International Labour Standards Department, and indicated that employers had put forward a number of principles related to the right to strike within the context of the supervisory bodies.

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- 191.** The weakening of the ILO supervisory machinery would hinder the action for the Office to resolve problems experienced by employers' and workers' organizations in a number of countries. She wished to express the view that many employers' organizations had been able to exist and thrive because of the work of the Committee of Experts together with that of the Conference Committee. The failure to discuss individual cases was in no one's interest, as workers' and employers' organizations had come to the Conference to have their concerns examined, as provided for by the Standing Orders of the International Labour Conference.
- 192.** Numerous options had been proposed to address the issues relating to the right to strike. It had to be borne in mind that any decision to refer the question of the right to strike to the ICJ, as provided in article 37(1) of the ILO Constitution, could have the effect of making the principles on the right to strike obligatory, while they were now only soft law. She emphasized the need not to forget that the members of the Committee of Experts were appointed through a tripartite process by the Governing Body. She concluded by stating that it was a sad day for the supervisory system and that she shared the concerns expressed during the sitting of the Committee.

The reply of the Chairperson of the Committee

- 193.** The Chairperson expressed his deep regret about the current situation. Nonetheless, he expressed optimism that this situation should allow for reflection and for a solution to be found. The social partners had the same goals of social justice, peace and welfare and trust between them was not lost.

The reply of the Legal Adviser

- 194.** The Legal Adviser, speaking in response to the question raised by IMEC as to what options were available to the Conference Committee to deal with the issues raised by the Employer members on the supervisory machinery and how this could be done in the appropriate forum, presented two options. First, a specific chapter could be created in the report of the Committee on the Application of Standards reflecting the content of the discussion and the different views expressed on the functioning of this Committee, including those in relation to the reports of the Committee of Experts. The specific chapter could terminate with a request for the Conference to decide to ask the Director-General to communicate that chapter to the Governing Body, with a further request for its appropriate follow-up as a matter of urgency. The terms of this request could be further defined in the proposed decision and could include suggestions on the manner in which the Conference would further review the matter following action taken by the Governing Body within its mandate, including any relevant proposals on reform in relation to the functioning of the Conference Committee. Secondly, Committee members concerned could submit the text of a proposed resolution for this Committee to submit to the Conference together with its report. This resolution could note the different views expressed at this session and call for a review of the matters raised and the functioning of the Conference Committee's working methods, including in relation to the reports of the Committee of Experts. It could invite the Governing Body to take up this issue as a matter of urgency, in the context of its ongoing work relating to reform of the Conference or in any other appropriate manner. Such a resolution would be submitted and discussed in accordance with article 63 of the Standing Orders of the Conference.

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195. The Chairperson indicated that he was forced to close the discussion due to the failure to adopt a list of cases to be discussed during this session of the Conference Committee.

F. Follow-up discussion on the way forward

196. The Government member of Sudan, speaking on behalf of the Government group, stated that the Government group was not at this time in a position to discuss the substantive and procedural issues in relation to the functioning of the Conference Committee and the reports of the Committee of Experts. The Government group had noted the options presented by the representative of the Legal Adviser and recommended that a specific chapter be included in the report of the Committee on the Application of Standards reflecting the content of the discussion on those issues as well as the different views expressed. The Government group suggested that the specific chapter should terminate with a request for the International Labour Conference to decide to ask the Director-General to communicate that chapter of the report to the Governing Body, with a further request for its appropriate follow-up as a matter of urgency.
197. The Government member of Belarus supported the statement of the Government group and added that the specific chapter was an important issue which should be brought to the attention of the International Labour Conference.
198. The Employer members were optimistic that, after reflection upon the situation, the Committee would find a way forward, since the tripartite constituents had one common aim – social justice. They appreciated the legal opinion given by the Legal Adviser and anticipated that further questions would be raised by the Committee. However, the Employer members expressed the concern that both options elaborated upon in the legal opinion necessitated further delay in seeking a solution and required this Committee, despite being a sovereign body and the apex of the supervisory system, to refer the matter to a lower body, the Governing Body. In their view, the problem would not be solved before the Governing Body but rather returned to the International Labour Conference at a later stage. It was thus preferable to find a solution now rather than to perpetuate the crisis. Therefore, the Employer members submitted the proposal to add the following text as an introductory paragraph to the General Survey and the report of the Committee of Experts:

Appendix V (Article 408 of the Treaty of Versailles) to the *Record of Proceedings* of the International Labour Conference in 1926 explained the necessity of a technical committee of experts (later named the Committee of Experts on the Application of Conventions and Recommendations (CEACR)) as follows:

“The functions of the Committee would be entirely technical and in no sense judicial.”

“It was agreed however that the Committee of Experts would have no judicial capacity nor would it be competent to give interpretations of the provisions of the Convention nor to decide in favour of one interpretation rather than of another.”

At the 103rd Session of the Governing Body in 1947, it was explained that the CEACR would “carry out an examination of the annual reports submitted by the Governments ... in preparation for the examination of these reports from a wider angle by the Conference” and that this served as an “indispensable preliminary to the over-all survey of application conducted by the Conference through its committee on the Application of Conventions” (paragraph 36, Annex XII, Minutes).

199. The Employer members underlined that this text had been agreed upon in 1926 and reaffirmed in 1947 and that nothing had changed since. They raised the question as to why no agreement could be reached on the insertion of such a text at present. While acknowledging that the current situation was very difficult for governments and that they needed time to consult with their capitals, the Employer members reiterated that there was



Twenty-first sitting

Thursday, 14 June 2012, 10.10 a.m.

President: Mr Alburquerque de Castro

REPORT OF THE COMMITTEE ON THE APPLICATION OF STANDARDS: SUBMISSION, DISCUSSION, AND APPROVAL

Original Spanish: The PRESIDENT

We will now proceed to examine the report of the Committee on the Application of Standards, which is contained in three parts in *Provisional Record* No. 19. I invite the Officers of the Committee to come up to the rostrum: Mr Paixão Pardo, Chairperson; Mr Syder, Employer Vice-Chairperson; Mr Leemans, Worker Vice-Chairperson; and Mr Katjaimo, Reporter.

I now give the floor to Mr Katjaimo to present the report.

Mr KATJAIMO (Government, Namibia; Reporter of the Committee on the Application of Standards)

It is a pleasure and an honour to present to the plenary the report of the Committee on the Application of Standards.

The Committee is a standing body of the Conference, empowered under article 7 of its Standing Orders to examine measures taken by Members to give effect to the provision of the Convention to which they are parties, as well as the information in reports concerning Conventions communicated by Members in accordance with article 19 of the Constitution.

The Committee provides a unique forum at the international level. It gathers actors in the real economy, drawn from all the regions of the world, who have sat alongside one another during times of economic booms and busts. Bringing together this diverse group allows for robust tripartite dialogue, but can also, at times, present challenges. The Committee has been faced, this year, with a unique situation. It was not able to examine individual cases of violations of labour rights. While it was not able to fully fulfil its mandate, the Committee held numerous discussions, the content of which is reflected in this report before you.

The report is divided into two parts corresponding to the principal questions dealt with by the Committee. The first part addresses the Committee's discussion on general questions relating to standards and the General Survey of the Committee of Experts, which concerns, this year, the eight fundamental Conventions. The second part concerns the Committee's special sitting on the question of the observance by Myanmar of the Forced Labour Convention, 1930 (No. 29).

I will recall the salient features of the Committee discussions in respect of each of these questions. The Committee had the pleasure of welcoming the Chairperson of the Committee of Experts on the Application of Conventions and Recommendations, who attended the first week of its session as an observer with the opportunity to address the Committee. It also examined the General Survey of the Committee of Experts on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization.

The Committee held in-depth discussions on the General Survey, highlighting the interrelationship and mutually reinforcing nature of the eight fundamental Conventions. The Committee noted that these Conventions remain relevant and well equipped to deal with existing and emerging issues related to fundamental principles and rights at work. The Committee observed that significant progress has been made in the implementation of these Conventions, and underlined the importance of technical assistance in both improving the application of the fundamental Conventions and removing obstacles to their ratification. Unfortunately, the Committee was not able to present an outcome to the Committee for the Recurrent Discussion on Fundamental Principles and Rights at work due to an absence of consensus between the social partners on the content of such an outcome. A brief summary of the discussion of the General Survey was nevertheless presented to the Recurrent Discussion Committee.

Pursuant to the resolution adopted by the Conference in 2000, the Committee held a special sitting to examine developments concerning the question of the observance by the Government of Myanmar of the Forced Labour Convention, 1930 (No. 29). The Committee welcomed the progress achieved towards complying with the 1998 recommendations of the Commission of Inquiry and observed that many important steps had been taken by the Government of Myanmar since its meeting last year. The Committee also welcomed the elaborate and detailed Action Plan developed between the Government and the ILO. It emphasized that all the social partners and civil society organizations must be able to play an active role in prioritizing and assisting in the accelerated application of the elements in the Plan most relevant to the immediate implementation of the recommendations of the Commission of Inquiry.

The Committee encouraged the Government and the ILO to monitor closely the progress made in the

implementation of this Action Plan. Moreover, the Committee considered that the action taken to prosecute forced labour should continue to be reinforced and the newly adopted legislation effectively applied so as to ensure complete accountability under the law and trusted that effective and dissuasive sanctions would be imposed to punish the use of forced labour in all sectors.

The Committee renewed its call for continuing collaboration of all agencies in the United Nations system in the efforts for the effective elimination of forced labour in Myanmar. It once again called on all investors to ensure that the activity in Myanmar was not used to perpetuate or extend the use of forced labour but rather made a positive contribution to its complete eradication, in full respect for international labour standards.

Lastly, the Committee called for the strengthening of the capacity of the ILO Liaison Office to assist the Government, the social partners and all other relevant stakeholders to play a full and constructive role in the efforts made to eliminate forced labour, including through the empowerment of communities in the knowledge and exercise of their rights and responsibilities.

Turning to the Committee's general discussion, one issue of common interest which has been broadly emphasized by the Committee is the fulfilment of reporting obligations by member States. The work of the Committee on the Application of Standards, as well as that of the Committee of Experts, hinges primarily on the information contained in the reports submitted by governments. This year, again, the Committee noted that, although the strengthened follow-up put in place by the Committee had achieved some positive results, serious difficulties remained. Further progress is still necessary and indeed crucial for the effectiveness of the ILO supervisory system. The Committee reiterated its call on the Office to pursue its technical assistance to member States to enable them to fulfil their constitutional reporting obligations. In this regard, the Committee noted that the Office was implementing technical assistance programmes specifically targeted to those member States hampered by persistent reporting or implementation gaps in their international labour standards obligations.

As mentioned earlier, the Committee was unable to examine individual cases but decided, to avoid any further disruption to the functioning of the ILO supervisory mechanisms, to request the governments included in the preliminary list of cases that had been drawn up to send a report to the Committee of Experts to be examined at its next session.

The Committee also devoted several sittings to a broader discussion on the possible ways forward to ensure that this situation was avoided in the future. In this regard, following tripartite consultation, a decision was adopted which reads as follows.

The Committee noted that different views were expressed on the functioning of the Committee in relation to the reports of the Committee of Experts which were submitted for its consideration as found in paragraphs 21, 54, 81–89, 99–103 and 133–244 of this report.

The Committee recommended that the Conference: (1) request the Director-General to communicate those views to the Governing Body; and (2) invite the Governing Body to take appropriate follow-up as a matter of urgency, including through

informal tripartite consultations prior to its November 2012 session.

This year's meeting highlighted the importance of seeking constructive solutions in spite of a divergence of views. Many members of the Committee expressed their strong commitment to the work of the Committee, and it is hoped that positive steps would be taken to ensure that the work of the Committee can function smoothly next year.

I would like to thank the Chairperson, Mr Sérgio Paixão Pardo, along with the Employer and Worker Vice-Chairpersons, Mr Chris Syder and Mr Marc Leemans, for the work they carried out this year.

I would like to recommend that the Conference approve the report of the Committee on the Application of Standards.

Mr SYDER (*Employer, United Kingdom; Employer Vice-Chairperson of the Committee on the Application of Standards*)

On behalf of the Employers' group I commend to this plenary the detailed Report of the Committee on Application of Standards. You have it before you, and I confirm that it is well described by the Reporter.

Traditionally, the Employers' group report is divided into two parts: first, our views on certain elements of the Committee's work and, second, a look to the future given our reflections arising from the 101st Session of the International Labour Conference. However, this year I think we can all agree that we have had a challenging experience. In the past few days several people have congratulated the Employers in a humorous, often sarcastic way saying that the Employers have won.

Much has been written in external media, much of it is incorrect. Let me be clear, the Employers are firmly of the view that no one has won anything from this year's experience because no cases were supervised, and our Committee did not fulfil its constitutional mandate. Accordingly, we will depart from our tradition, because this year we wish to be transparent to everyone about how we see, firstly, tripartism within the Committee, and secondly, the future supervision of labour standards.

I will start by highlighting that we support the majority of this year's General Survey, which was the first Survey of all eight fundamental Conventions. The General Survey showed that progress had been made in the implementation of the fundamental Conventions in many respects, which is encouraging. However, much remains to be done.

Regretfully, I must now turn to more contentious issues. I must emphasize what I said on the record to this plenary on behalf of the Employers' group last year. I said that "the ultimate responsibility for ILO standards supervision lies with the ILO's tripartite constituency", that is our Committee, the Conference Committee on Application of Standards. Article 23, paragraph 1, of the Constitution stipulates clearly that summaries of the reports that member States have to provide under articles 19 and 22 be submitted to the tripartite Conference for examination and assessment. I said that ILO standards supervision had to be at the service of the ILO's tripartite constituents; its results should duly take into account their needs, which include the needs of Employers. I said that the Committee of Experts is not, and should never be, a policy committee. We fundamentally believe that the purpose of the General Survey is to help the tripartite constituents better understand the application of the provisions of a

given instrument, how to be in compliance, or what steps need to be taken to be in compliance with ILO standards. The increasing policy orientation of the General Survey jeopardizes the technical value of the analysis and thus changes the purpose of the constitutional obligations under article 19.

These comments regretfully are more relevant and pertinent this year. These comments are not new; these comments have been made consistently for decades by my predecessors, Ed Potter and Alfred Wisskirchen.

I turn now to some concerns regarding the status of the experts and the General Survey. The facts of the matter are that the General Survey is a guide to the Conference Committee on the Application of Standards to assist it with its work when supervised in the application of ratified labour standards by member States of the ILO. The General Survey, like the Report of the Experts on the Application of Conventions and Recommendations is not an agreed or authoritative text of the ILO tripartite constituents, namely the Governments, Employers and Workers. Both the General Survey and the Report of the Committee of Experts on the Application of Conventions and Recommendations are created with the assistance of the International Labour Office. The Governments, Employers and Workers are not involved in their creation or publication. The first opportunity for governments, employers and workers to consider these publications as groups is at the International Labour Conference, not at the Governing Body. Our Committee is the apex of the supervisory system and this must be respected. Outside of the ILO, this important distinction is either misunderstood or forgotten, and General Surveys are seen as being the position of the Organization which they are not. It would be damaging if the experts' views were taken as the views of the Organization in other United Nations or international forums. It undermines tripartite relationships and weakens the ILO supervisory machinery. This is an issue we are calling to be discussed at the Governing Body.

The situation is exacerbated by the fact that the General Survey has been published and distributed worldwide without any approval of the Committee first. We are conscious that the fundamental ILO Conventions are already embedded into the United Nations Global Compact, OECD guidelines for multinational enterprises, the UN Human Rights Council's Ruggie Framework, ISO 26000, and the MNE Declaration.

Our Members are asking us how they should respect human rights instruments that reference the fundamental Conventions. The ILO supervisory machinery relates to member States only, not to businesses, so it is vital that when other international institutions use the fundamental Conventions, that such use is correct. A correct understanding of fundamental Conventions is imperative for businesses because they are used in international framework agreements, transnational company agreements and in European framework agreements with global trade unions, where they are often not defined. In our view, the Employer and Worker spokespersons should meet with the experts before they start their work each year, and experts should have far greater interaction with employer and worker bureaux within the ILO in order to strengthen cooperation and governance. The experts

should have a tripartite agreed framework in which to do its work.

In past years, the Employers have proposed changes to the format of reports of the experts with a view to have tripartite views better reflected. More precisely, the Employers propose that there should be possibilities for employers, workers and governments to set out in the reports of the experts their views on standard supervision related issues, including on the application and interpretation of particular Conventions.

Tripartism, which is integral to a democracy, is an essential ingredient to creating a global consensus on the meaning, scope and implementation of ILO standards.

Moving forward, for the standard supervision to have credibility in the real world of work, ACT/EMP and ACTRAV must have equal resources and be fully engaged with the Standards Department to help prepare the Office work in the supervision of standards.

This year, regretfully, matters became a lot worse from our perspective because in advance of this Conference the Committee of Experts published a General Survey on the eight fundamental Conventions of the ILO which set out their highly contentious views on the right to strike within Convention No. 87. In addition, I highlight that this year the experts made 73 observations on Convention No. 87; 63 out of those 73 observations, around 86 per cent deal, at least partly, with various aspects of the right to strike. It is important to recall again that last year in this plenary I said: "a number of the individual cases examined dealt with various aspects of the disputed right to strike". As is well known, we have continuously and strongly objected to the expert's interpretations on the right to strike, and the fact that it has no legal basis whatsoever in Convention No. 87.

We have put forward in detail the legally correct arguments for many years and, in particular, in the context of the 1994 General Survey on Convention No. 87, as well as in many discussions on individual cases in plenary and in the *International Labour Review*.

Regretfully, our longstanding concerns were not addressed in this year's General Survey.

The Employers' position is that Convention No. 87 is silent on the right to strike because there was no agreement at the time of its negotiation to include it in the Convention and, in the view of the Employers, it is therefore not an issue upon which the experts should express any opinion. In doing so, the experts are effectively making policy, which is the exclusive domain of the Governments, Worker, and Employer representatives of the Organization. The mandate of the experts is to comment on the application of Convention No. 87 and not to interpret a right to strike into Convention No. 87.

When the Committee of Experts was created, it was defined by the International Labour Conference at its Eighth Session in 1926 as having, and I quote, "no judicial capacity, nor would it be competent to give interpretations of the provisions of a Convention, nor to decide in favour of one interpretation rather than of another". This mandate has not changed. While the experts can advise on application, they may not determine application on behalf of the constituents, nor can they determine new rights and obligations regarding the right to strike. It may be argued that the experts derived their inter-

pretation of the right to strike from the tripartite Committee on Freedom of Association. However, the Employers have also objected for many years about the use of such cases by the experts when examining Convention No. 87, as the Committee on Freedom of Association creates non-binding recommendations on a case-by-case basis, based on constitutional obligations regarding freedom of association, not the freedom of association Conventions.

While acknowledging the importance of both the Committee on Freedom of Association and the experts, the Employers, regretfully, are critical of the confusion and lack of certainty regarding the relationship between the supervisory bodies. The Employers have always objected to any view that the experts' interpretations of the right to strike are legal jurisprudence or even soft law. As the experts do not have a judicial mandate within the ILO, referring their interpretations of the right to strike within Convention No. 87 to the International Court of Justice is therefore inappropriate.

Further, neither the Committee on Freedom of Association nor the Governing Body, to which it refers its recommendations, produce jurisprudence or supervised labour standards. For the same reason, referring the Committee on Freedom of Association Recommendations to the International Court of Justice is also inappropriate.

It is important, again, to be clear that the Office is not the Organization. The Organization is its Government, Worker, and Employer constituents. This means that the Office has to be very careful when it refers to the views of the experts and the promotion of them, lest the experts' views be taken as the views of the Organization in other United Nations or international forums.

Let me be clear. The Employers' group acknowledges that a right to strike exists at the national level in many jurisdictions, but we fundamentally do not recognize that the meaning of a right to strike should be the one being developed by the experts. The determinative body to decide any rules for a right to strike recognized by the ILO is the Conference. Otherwise, it is up to national legal systems to do so. The experts do not have a mandate to interpret Convention No. 87. An ILO right to strike standard would need to be politically agreed on a tripartite basis by the Conference. For instance, the following issues concerning the right to strike should be discussed on a tripartite basis, rather than left to the experts to develop on their own: lawful strikes, including sympathy strikes and political strikes; essential services, especially if on a narrow basis; legality of workplace occupations during strikes; legality of picketing; dissuasive sanctions for illegal strikes.

Now, when we consider the future supervision of labour standards, it is important to be transparent about what actually happened this year. In summary, given the Employers' long-standing objections to the experts' interpretation of the right to strike, the Employers sought to clarify the mandate of the experts with regard to the General Survey. The Employers brought this important issue to the attention of the Workers and their spokespersons together negotiated and formulated the following draft clarification: "The General Survey is part of the regular supervisory process and is the result of the Committee of Experts' analysis. It is not an

agreed or determinative text of the ILO tripartite constituents."

The Employers' proposal was that the International Labour Office would be instructed to immediately insert the clarification in future hard copy and ILO website publications of this year's General Survey and the Report of the Committee of Experts on the Application of Conventions and Recommendations. It is not possible to simply remove the experts' interpretations as the International Labour Office has already published a General Survey containing the experts' interpretation of the right to strike.

The Employers made it clear that without the abovementioned clarification in respect to the General Survey, they could not accept the supervision of Convention No. 87 cases that included interpretation by the experts regarding the right to strike. Otherwise, their position would not be logical or coherent. All other cases on the provisional long list could be considered, which included the most serious double footnoted cases. After much confidential negotiation with the Workers, regrettably, these negotiations irretrievably broke down, principally because of the request for the clarification and the linkage to the right to strike cases. If the clarification could have been agreed, then the Employers' view is that the list of cases could have been successfully negotiated by the latest on Friday morning of the first week of our Committee.

The Employers' position is that the proposed clarification is fact and should not have been a contentious issue. We subsequently proposed a way forward within the Committee that referenced the agreed position of the experts in 1926, as affirmed in 1947. But it was not possible to reach a consensus on the correct approach.

So, in closing, the Employers remain frustrated that the factually and legally correct arguments we put forward concerning the experts' mandate met with a reaction that had nothing to do with the content of our position, and on occasions clearly misrepresented our position. The risks associated with the General Survey being misused and misconstrued remain. Important communication and committee management issues have arisen this year, which we will all learn from. We must do better in the future.

One of the main tasks of our Committee is to supervise the cases of member States that allegedly violated international labour standards. Let there be no confusion about the fact that Employers wanted to hear cases too. The ones that come to my mind are Serbia and Uruguay. The Employers would have heard the case of Uzbekistan.

We now have a way forward that will involve the Governing Body and tripartite informal consultations. The Employers look forward to reaffirming that the mandate agreed upon in 1926 and affirmed in 1947 is still correct. We look forward to doing so in an environment free of external interference, which exacerbates this situation.

Neutrality and the ability to listen to the constituents will help create mature and respectful international industrial relations between governments, employers, and workers. We look forward to working together with our social partners to resolve these issues before this time next year as we cannot be faced with a situation where the right to strike prevents a list of cases being agreed between the Employers and the Workers.

Once again this year our Chairperson, Sérgio Paixão Pardo, deserves special thanks for the firm, but fair, parliamentary running of the meeting this year. He has been the epitome of calm in the storm and we must not ever forget that it was his optimism and spirit that helped pave the way to the agreed way forward.

Thanks must also go to the Office for bearing with all of us in this unusual and difficult year. We must also thank the Governments. As I said in our Committee, it was never our intent to distress or inconvenience them this year.

We thank our Reporter, David Katjaimo, for keeping us all on balance. Please allow me to thank the Employers' group and especially my colleagues, John Kloosterman, Paul MacKay, Sonia Regenbogen, Juan Mailhos, Jorge de Regil, Peter Ander-

son, Alberto Echavarría and Zodwa Mabuza for the help they gave me. I would like to express my immense gratitude and admiration for the support given by Alessandra Assenza, Haymel Brito of the International Organisation of Employers and Christian Hess and Jennifer Bernardo of ACT/EMP. We would be lost without their support. I must thank Marc Leemans, Worker spokesperson, and his team. Simply put, we have been through an experience this year that none of us will ever forget. And lastly, but certainly not least, thanks to the interpreters who have done their usual excellent job this year.

In conclusion, I affirm again, on behalf of the Employers' group, their continued support for an effective and relevant ILO supervisory system.

(The Conference adjourned at 10.55 a.m.)

Twenty-second sitting

Thursday, 14 June 2012, 11.50 a.m.

President: Mr Alburquerque de Castro

REPORT OF THE COMMITTEE ON THE APPLICATION OF STANDARDS: SUBMISSION, DISCUSSION AND APPROVAL (*CONT.*)

Original Spanish: The PRESIDENT

We will now resume the discussion of the report of the Committee on the Application of Standards. I give the floor to Mr Leemans, Workers' delegate from Belgium and Worker Vice-Chairperson of the Committee.

Original French: Mr LEEMANS (Worker, Belgium; Worker Vice-Chairperson of the Committee on the Application of Standards)

During this session of the Conference, the Committee on the Application of Standards was not in a position to conclude its work. I would like to explain this failure as best I can, in the sincere hope that it will not be detrimental to the ILO.

The Committee on the Application of Standards is a standing committee, it is part of the regular machinery for the supervision of ILO standards. The General Survey based on the experts' report is within the purview of our Committee. The 2012 General Survey was concerned with the eight fundamental Conventions.

It was expected that our Committee should present joint conclusions with the Committee for the Recurrent Discussion but the concerted attack led by the Employers' group against the General Survey unfortunately prevented this. The Workers' group insisted once more on tripartism, which is the basis for the functioning of the ILO and is unique within the United Nations system.

This tripartism is essential and it should not be endangered in any way. In my capacity as spokesperson of the Workers' group I recalled the originality of the whole supervisory machinery of the ILO. Since it cannot impose any criminal or financial penalties, it can only be effective using regular and special supervisory mechanisms. Here the role of the Committee of Experts is fundamental. Its work is an essential and constant tool for ensuring a better application of standards and this role consists of preparing, with rigour, independence and objectivity, the work which will then be taken up and used as a basis by the Committee on the Application of Standards, and we must make sure that standards are applied properly in law and in practice.

The role of the experts is also to establish a dialogue with governments through direct requests. The experts have a pedagogical role both through the General Surveys and through the identification

of cases of progress. On the basis of the report of the Committee of Experts, the workers' and employers' organizations can find legal and practical ways of advancing and promoting the application of ILO standards.

The work of this Committee and its examination of individual cases is another key aspect of the supervisory machinery. It draws on the work of the Committee of Experts, but the tripartite examination of individual cases also confers exemplary authority on the work of our Committee. Thanks to this collective tripartite examination of individual cases, our Committee, through the conclusions which it adopts, puts clear pressure on States who have simply failed to meet their obligations or are perhaps totally uncooperative.

Despite this and without any warning, from the first week of this session of the Conference we were brutally confronted with the fact that the Employers' group was challenging the mandate of the experts, particularly with regard to their interpretation both of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and of the right to strike. Brutally was the word I used. Why?

As in the past, considerable preparatory work had been done within the Workers' group since March 2012, and also in April and May. This preparatory work is taken very seriously because, as far as the Workers are concerned, the discussion of individual cases, the most serious cases, at the Conference is a unique element in our work. It is the only time when the Workers can, without fear, describe the many violations of their rights, the rights which are recognized by the ILO standards.

The experts' report was published on 28 February 2012, and the General Survey was published on the same date. The electronic version of these documents were published on the website on 2 March 2012. At no point during the 313th Session of the Governing Body in March 2012 did the Employers give any sign of any criticism concerning the role of the Committee of Experts or any indication that the latter were exceeding their powers concerning their interpretation of the right to strike.

It was only on Friday, 1 June 2012, that the Employers, in the context of the meeting of the Committee, explained how they regarded this divergence of views. The direct consequence of this was that an explicit veto was expressed concerning any possible examination of individual cases where the right to strike might be involved in the discussion. It was at this point in time that it became absolutely clear

that, as far as the Employers were concerned, the experts' interpretation of the right to strike was totally unacceptable because it did not fit in with the Employers' viewpoint.

Since I had no further possibility to say any more on the right to strike in view of how events unfolded, I will now come back to this matter, since it needs to be clarified for the Employers and the Governments present in this room.

Whether we like it or not, the right to strike is not just a national issue to be judged and dealt with in the light of temporal or economic circumstances. We might suppose that, in response to this analysis, the Employers may suggest that national jurisdictions would be more inclined to take account of economic realities and the needs of business in their decisions rather than the interests of the Workers.

The Employers' group no doubt think that courts and tribunals will be less conservative or less partial than the supervisory machinery of the ILO, particularly the experts. This is insulting to the independence of judges and disregards the supremacy of international law in general with respect to ratified treaties. National courts and tribunals, in their decisions on this subject, must respect a hierarchy of sources of law which, beyond any shadow of doubt, place international treaties above national law and above ratifications.

Apart from Convention No. 87 and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), I could take as an example the International Covenant on Economic, Social and Cultural Rights. Or there are texts that apply regionally, such as the Charter of Fundamental Rights of the European Union, the European Social Charter, the European Convention for the Protection of Human Rights and Fundamental Freedoms, or the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador").

There are further examples. The Committee of Experts recognizes, in its General Survey of 1959, the right to strike and considers it a fundamental tool for workers' organizations in defending their economic and social rights. The right to strike is an inalienable corollary to the right to organize. It is also set out in the opinion of the Committee on Freedom of Association recognizing such a right in 1952. It is true that the right to strike is not mentioned explicitly in the ILO Constitution, in the Declaration of Philadelphia or in the Conventions specifically relating to trade union freedoms. Nevertheless, there is an indirect reference to it in the Voluntary Conciliation and Arbitration Recommendation, 1951 (No. 92), and in a number of resolutions adopted by the International Labour Conference.

The Committee of Experts considers that this right has been established since the very first report was drawn up in the context of the first discussion following the adoption of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87).

The Committee of Experts infers the existence of the right to strike from a joint reading of Articles 3 and 10 of Convention No. 87. Article 3 refers to the right of workers' and employers' organizations to organize their administration and activities and to formulate their programmes. Article 10 defines as an organization any organization of workers or em-

ployers for furthering and defending the interests of workers and employers.

The Committee of Experts considers that, in order for workers to be able to further and defend their interests, they must have available to them means of action which can apply pressure so that their claims are successful. The common meaning of the term programme includes going on strike. Going on strike is a collective right and is considered to be an activity, in the sense of Article 3.

On 5 June 2012, after long and difficult negotiations, a draft agreement was submitted by our Chairperson, Mr Sérgio Paixão Pardo, for approval by the Committee, and it was too late at that stage to draw up a list of individual cases, to the great displeasure of the Governments. Under this agreement, the divergence of views between Workers and Employers concerning the report of the Committee of Experts must be resolved as a matter of urgency.

The Workers accepted this text and the procedures it entailed, but our distress at the events that have taken place is immense. This statement is no way makes up for the fact that, at the end of the day, none of the cases were discussed. We will never be able to take a positive view of the events that have blemished our activities. The negotiations were trying and will leave their mark. The way things unfolded will scar the memory of the Workers' group, the experts and the staff of the ILO, whose impartiality has been called into question in an unacceptable manner.

As my colleagues go back to their own homes around the world, they will be upset and in some cases afraid. They came here in order to denounce violations of the rights guaranteed to them by ILO Conventions. They are going home empty-handed, with no conclusions from our Committee and without support from the international community to revive their courage to tackle cases of harassment, assault, murder and violations of their basic rights by governments and by national or international enterprises.

Should I request a minute of silence for the 25 cases that we will never deal with?

We should tell you that, on its own initiative, the Workers' group organized its own examination of some of the cases during this session, which other groups were free to join. This way of proceeding made it possible to ensure that the work already done by our colleagues since the publication of the report of the Committee of Experts on 28 February 2012 did not go to waste.

I would like to add that the 49 countries that appeared on the preliminary list are expected to report to the Committee of Experts by 1 September 2012 at the latest. Their reports must include replies to the comments of the Committee of Experts contained in its report. In this way we would avoid any interruption to the functioning of the supervisory mechanisms. Many governments have indicated their agreement with this request.

These last two weeks have been dark days indeed for the Committee on the Application of Standards. They have been two disastrous weeks for the supervisory mechanisms as a whole. We have the impression that, as far as the Employers are concerned, the 2012 session of the Committee on the Application of Standards is over, that everything will be all right tomorrow and that, in 2013, it will take up its work again as if nothing had happened. Had we been aware of the difficulties well before the Con-

ference, we could have taken immediate action in the framework of a social dialogue in good faith, which would have enabled us to make better progress more quickly here in our monitoring role, instead of creating a crisis situation which is damaging to everyone.

We, more than anyone, want to weather this storm. The Employers need the Workers and their representatives. They should not forget this. Without social peace, without interlocutors, it will be the law of the jungle and there will be no more talk of productivity or growth.

I would like to now thank everybody. Firstly, I would like to thank the Workers' group, especially the Officers of the Workers' group in our Committee, who have worked incredibly hard. I would also like to thank Mr Paixão Pardo, our Chairperson, and Ms Doumbia-Henry and Ms Curtis and their colleagues in the Office for the legal and technical assistance they have given us.

A big thank you also to our Reporter, Mr Katjaimo, for his excellent report. I would also like to thank the Government members for their constructive contributions, and I also thank the Employer spokesperson for his involvement in our work. I thank the ILO staff for being so available and friendly, and of course the interpreters. I would like to thank the International Trade Union Confederation, particularly Stephen Benedict, and our colleagues in ACTRAV, Beatriz Vacotto and Enrico Cairola.

Mr President, I request that the report of the Committee be approved.

Original Spanish: The PRESIDENT

I now give the floor to Mr Paixão Pardo, the Government delegate of Brazil and Chairperson of the Committee on the Application of Standards.

Original Spanish: Mr PAIXÃO PARDO (Government, Brazil; Chairperson of the Committee on the Application of Standards)

It is an honour for me to have this opportunity to share with the all delegates our impressions on the meeting of the Committee on the Application of Standards this year.

We said it in the Committee and I am repeating it now: I consider this year to be a sabbatical, which will help us think about and propose alternatives to break the deadlock we have got ourselves into.

We now have a full year to test our creativity and problem-solving skills for the first time since 1926.

This year, we have seen the Chairperson of the Committee of Experts, Mr Yokota, who will convey our concerns to the other members of his Committee.

We have seen the President of the Conference, Mr Alburquerque, who brought us a message of encouragement and hope, for which we are grateful.

We met with the Director-General to express our concerns and received a wise piece of advice: that we listen carefully to everyone on our Committee and find out what each of us wants for this Committee. To that end, we will be holding informal tripartite consultations so that, in November, we have a diagnosis and possible solutions.

This year, there are no winners or losers. We were always winners, but now we are all responsible for carrying out one of the most important reforms of this Conference, one of which is on the working methods of our Committee, and looking at the role of the regular supervisory mechanisms, and here I

am quoting from the 2008 Declaration when it referred to regular, independent, inseparable, and interrelated supervisory mechanisms. The Governing Body will have to work hard to ensure that next year we can return hope to the world of labour.

This year, we have not had special paragraphs, offers or acceptance of technical cooperation. There have been no dramatic debates. There were no speeches of hope in the conclusions of the Committee.

The eyes of the world are looking to this Committee as a strong defender of the ideals of freedom and democracy. We have not forgotten those ideals and will pick them up again after this sabbatical year.

Freedom of association, the fight against forced and child labour, health and safety at work, the creation of sustainable enterprise and the defence of the right to private initiatives, as well as equality between men and women, an end to discrimination, the rights of indigenous and tribal peoples, the protection of wages, all these are very important issues, but we are going to have to take a pause for the moment from discussing them. In so doing, I must convey my apologies to all those who hoped for a more substantial response to these matters from our Committee and are going to have to return home empty handed.

However, a note of hope: I do believe, that our Committee will emerge from this situation strengthened.

Mr President, we have not wasted our time either – we did hold a special sitting on Myanmar and I am delighted to have had the opportunity today to see and hear a Nobel Peace Prize winner, Ms Aung San Suu Kyi, here addressing us. Our Committee fought for her freedom for many, many years and it was wonderful to see her here today as result of our debates.

Speaking on behalf of the Committee, I would like to say that we hope that very soon freedom of association, the complete elimination of forced labour, and full democracy will become a reality in Myanmar. The Committee on the Application of Standards shall continue to work as it has done in the past to help to bring that about.

Before concluding, I should like to thank our Reporter, Mr Katjaimo, who had a different account to give this year – but it was nonetheless interesting.

My thanks also go to Christopher Syder, for the Employers, and Marc Leemans, for the Workers. They both have a considerable potential for management and an ability for dialogue and conciliation.

I also thank Mr Kloosterman, who accompanied us this week alongside the Employers, for his charisma.

I should also like to thank the spokespersons for the Governing Body groups, Daniel Funes de Rioja and Luc Cortebeek.

My thanks also go to Mr Greg Vines, Chairperson of the Governing Body, for his efforts to help us overcome this impasse.

I would also like to thank the regional groups and Governments because this year we saw that Governments have a great deal to contribute to the work of the Committee. The Governments were excellent as they never shied away from any debate or discussion about the cases. They urged that the rules be complied with and duly observed. My thanks to GRULAC, the European Union, IMEC, the Africa

group and the Asia and Pacific group, thank you for your willingness to contribute.

I would like to extend a special word of gratitude to the Secretariat of the Committee, Ms Cleopatra Doumbia-Henry, who embodies the ILO's values of integrity, impartiality, and neutrality, and to Ms Karen Curtis and the support team who produced excellent quality documents in record time.

I also give my thanks to the interpreters for our Committee, who were always ready to convey our message and facilitate communication.

I invite you to carefully read and approve our report.

(The Conference adjourned at 12.15 p.m.)