

**Interpretation of international labour Conventions:
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- 1) the possibility of adapting the composition of the Court to take account of the special features of international labour Conventions: under Article 26 of the ICJ Statute, the Court can form “one or more chambers, composed of three or more judges as the Court may determine, for dealing with particular categories of cases; for example, labour cases ...”; nonetheless, the Court issues advisory opinions only in its plenary composition;
- 2) the access of the social partners to the interpretation procedure: under Article 66 of the ICJ Statute, the Court can address a notice to any “international organization considered by the Court (...) as likely to be able to furnish information on the question....”; however it is unclear whether these organizations could comprise international employers’ and workers’ organizations; it may be that the views of the social partners would have to be communicated to the Court directly (“amicus curiae”) or indirectly accompanying other statements; and
- 3) the methods and principles of interpretation that would be applied by the Court in interpreting international labour Conventions and which would best take into account their specificity.

2.3 The question of the rules and means of interpretation to be used for international labour Conventions

20. As regards the interpretation of international labour Conventions, the question arises as to whether the general customary rules of international public law, especially those codified in the Vienna Convention on the Law of Treaties, 1969 (the Vienna Convention),²⁹ meet entirely the special features of international labour Conventions, and in particular the role of the social partners in the adoption process.
21. As recalled by the 1993 study,³⁰ the Vienna Convention, in Articles 31 to 33, sets out the general rule and supplementary means of interpretation. The starting point for the interpretation of a treaty is the text itself considered in its context and in the light of its aims and purposes. The intention of the parties is subordinate to the text itself and, in accordance with Article 32, reference should only be made to the preparatory work where analysis of the text alone might produce a result that is unclear or absurd.
22. On the other hand, Article 5 of the Vienna Convention, which was included at the instigation of the ILO, provides that it “applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules³¹ of the organization.”

²⁹ The Vienna Convention codifies the basic rules for the interpretation of treaties, which have been widely recognized as customary law. There are many other rules that were not codified, such as the principle of effectiveness.

³⁰ GB.256/SC/2/2, para. 44

³¹ The records of the United Nations Conference on the Law of Treaties (*op.cit.*) show that “rules” was to be construed as covering written rules and the established practices of international organizations. See summary records of the plenary meetings of the Committee of the Whole, Statement made by the Special Rapporteur during the tenth meeting - 3 April 1968, para. 40 and the statement made by the Chairman of the Drafting Committee, during the twenty-eight meeting - 18 April 1968, paras.14-15.

23. As recalled by Mr. Jenks (Observer for the International Labour Organisation) in 1968 during the United Nations Conference on the Law of Treaties, in a number of respects international labour Conventions are governed by specific rules whether they are written (Constitution or Standing Orders of the Conference) or unwritten. Mention should be made in this respect of the inadmissibility of reservations to ILO Conventions, which is not set out in written rules, but is a consistent practice of the Organization. The inadmissibility of reservations is embedded in the specificity of ILO Conventions, particularly in light of the elements presented above.³²
24. Article 37 of the ILO Constitution does not refer to rules of interpretation that are to be followed by either the ICJ or a tribunal when interpreting ILO Conventions. Mr. Jenks indicated to the United Nations Conference on the Law of Treaties that “ILO practice on the interpretation had involved greater recourse to preparatory work than was envisaged” in the draft Convention.³³ The supervisory bodies have developed interpretative practices under which the preparatory work, but also the comments of the (other) supervisory bodies, and particularly the Committee of Experts in its general surveys, play a significant role.³⁴ On the other hand, none of these bodies has the formal mandate to issue authoritative interpretations. When the Conference Committee discussed the practice of the Committee of Experts, there was a clear divergence of views between its members as to the rules governing the interpretation of Conventions.³⁵
25. In the work leading up to the adoption of the Vienna Convention, the International Law Commission indicated that treaty interpretation is “to some extent an art, not an exact science”.³⁶ As emphasized in the 1993 study, the question of the determination of the rules governing the interpretation of Conventions is complex. The rules of interpretation could therefore more appropriately be settled by a body with the formal mandate to interpret Conventions under an adequate procedure allowing all the interested parties to present their respective positions on the question. The competent body would thus have to set out clearly the rules followed and their rationale.
26. An illustration of this approach can be found in the 1932 advisory opinion of the PCIJ on the interpretation of Article 3 of the Night Work (Women) Convention, 1919 (No. 4), the only authoritative interpretation of a Convention existing to date. The question referred to the Court was whether the Convention applies to women who hold positions of supervision or management and are not ordinarily engaged in manual work. The ILO representative underlined in his statement to the Court that there was a divergence between a strict literal interpretation of the

³² See the memorandum submitted by the International Labour Office to the International Court of Justice on the Reservations to the Convention on the prevention and punishment of the crime of genocide, 1951, op. cit.; see also “Réserves et conventions internationales du travail”, by Guido Raimondi, in *Les normes internationales du travail: Une patrimoine pour l'avenir: Mélanges en l'honneur de Nicolas Valticos*, ILO, 2004, pp.527-539.

³³ United Nations Conference on the Law of Treaties, Vienna Austria, First Session, 26 March-24 May 1968, 7th meeting of the Committee of Whole, Document A/CONF.39/C.1/SR.7, para.12.

³⁴ See paras 48-52 below.

³⁵ See para 52 below.

³⁶ See Report of the International Law Commission covering the work of its sixteenth session, (11 May-24 July 1964), Doc. A/5809, ILCYb.1964, II, 173, a 175, quoted in Isabelle Van Damme, *Treaty interpretation by the WTO appellate body*, International Economic Law Series, Oxford University Press, 2009, p. 42.

text and an interpretation which relied on the intention of the authors of the Convention. The Court started with the actual text, indicating that the wording of the provision “considered by itself gives rise to no difficulty: it is general in its terms and free from ambiguity or obscurity. It prohibits the employment during the night in industrial establishments of women without distinction of age.”³⁷ With reference to the arguments presented during its proceedings in favour of an interpretation restricting the application of the Convention to women engaged in manual work, the Court added that “it is necessary to find some valid ground for interpreting the provision otherwise than in accordance with the natural sense of the words”.³⁸ In so doing, it used other means of interpretation, such as the ILO Constitution, its own advisory opinions concerning the interpretation of the ILO Constitution and the preparatory work leading to the adoption of the Convention. It concluded that an examination of the preparatory work also confirmed the textual interpretation and “that there is no good reason for interpreting Article 3 otherwise than in accordance with the natural meaning of the words”.³⁹

3. Practice relating to the interpretation of ILO Conventions: Competent bodies and practices related to interpretation

27. ILO practice with regard to the interpretation of international labour Conventions involves all of the supervisory bodies and the Office. However, none of these bodies has been entrusted with the authority to interpret ILO Conventions.

3.1 The role of the supervisory bodies

28. Interpretation and supervision of application are two distinct processes, even though they are closely connected. As indicated above, interpretation is the process whereby the meaning of a text is determined. Moreover, the process of the interpretation of international labour Conventions may have to respond to specific needs; for example, in addition to the requirement of legal certainty, there may be a need for an open procedure in which all the parties concerned can express their views. Application can be defined as the process “of determining the consequences which, according to the text, should follow in a given situation”.⁴⁰ Under their respective terms of reference, the ILO supervisory bodies examine the measures taken by member States to give effect⁴¹ to the Conventions that they have ratified or their failure to secure the effective observance of these Conventions. Their primary function therefore relates to the supervision of application. The supervision of application may have its own requirements, such as a pragmatic and flexible approach, which has been highlighted in two Office studies on the links between the supervisory procedures.⁴² As noted above, the ILO Constitution distinguishes between supervision of application and interpretation and entrusts these functions to two different mechanisms.

³⁷ See Permanent Court of International Justice, Series A./B, Fascicule No.50 , op.cit. p. 12.

³⁸ *Ibid.*, p. 12.

³⁹ *Ibid.*, p. 19.

⁴⁰ See *International Labor Conventions, their interpretation and revision*, Conley Hall Dillon, University of North Carolina Press, 1942, p.121, note No.4.

⁴¹ See article 22 of the Constitution and see also GB.301/LILS/6(Rev.), para. 55, table providing a schematic overview of the main features differentiating the various supervisory procedures.

⁴² GB.301/LILS/6 (Rev.), paras. 39-79; GB.301/11, paras. 42-84; GB.303/LILS/4/2; and GB.303/12, paras. 100-111.

29. On the other hand, interpretation precedes application: before effect can be given to a text, its meaning has to be clear and, in the absence of clarity, its meaning may have to be determined. Application necessarily involves some degree of interpretation. Under the current functioning of the supervisory system, all the supervisory bodies have to deal with legal questions and are thus led, in many cases, to determine the meaning of the terms of a Convention. The work of the Committee of Experts and of Commissions of Inquiry involves a greater degree of interpretative work than that of tripartite supervisory bodies. This difference is inherent in the composition, methods of work and procedure of the Committee of Experts and of Commissions of Inquiry. In the case of the Committee of Experts, its role in this respect is further enhanced by the fact that it is a standing body which meets regularly.
30. As the interpretation of international labour Conventions has to a large extent been carried out by the supervisory bodies, the process has reflected the manner in which the supervisory system operates. Three main aspects, highlighted in the two studies mentioned above, influence the manner in which the supervisory bodies address issues relating to interpretation: (1) the variety of supervisory procedures, which complement one another; (2) the freedom of choice exercised by constituents in respect both of the issues they bring before the supervisory procedures and the procedures that they use, and in particular the fact that the examination of a legal issue under one procedure does not constitute an impediment to the initiation of another procedure on the same issue; and (3) the fact that the effective observance of international labour standards, being the common purpose of all the supervisory procedures, has given rise to the need to ensure coordination between the work of the supervisory bodies. It follows that the interpretation of Conventions, when addressed by the supervisory system, reflects the distinctive features of each procedure, as well as their interactions.

3.1.1 The regular supervisory procedure

3.1.1.1 The Conference Committee on the Application of Standards

31. The 1993 study emphasized that the Conference Committee has a role to play in matters of interpretation, as “authentic interpretations”, or the “interpretations given by parties to a treaty or by the body that is the author of a treaty, are one possible method of interpretation in international law”.⁴³ Moreover, the procedure of the Conference Committee offers a significant advantage, involving as it does “an open discussion, in which interested parties have an opportunity to put their case. The persons taking part are precisely those with whom the standards originated and thus in the best position to appreciate the implications of any change of context for their contents”.⁴⁴ This procedural advantage is counter-balanced by the risk that the positions taken by the Conference Committee with regard to the meaning of particular provisions may in fact entail a modification of the text adopted by the Conference. The 1993 study concluded that “an interpretation by the Conference, if it is to be perfectly legitimate, should logically be recast - that is, through a revision...”. The study added that “such a revision can be undertaken either spontaneously in the case of a difficulty encountered in

⁴³ GB.256/SC/2/2, para. 22.

⁴⁴ *Ibid.* para. 22.

application, or with the aim of reversing case-law with which one disagrees.”⁴⁵ The existing procedure for revision, however, was not designed to deal with specific difficulties of interpretation, but to adapt a Convention to new needs or realities. The study therefore raised the question of the need for a possible “intermediate solution that would enable the Conference to settle difficulties or controversies by means of simplified procedure (...)”.⁴⁶

32. In general, the role of the Conference Committee in matters of interpretation cannot be considered in isolation from that of the Committee of Experts. Its contribution consists mainly of commenting on the opinions expressed by the Committee of Experts, particularly in the context of its general surveys. The Conference Committee has acknowledged on many occasions that, due to the number of cases to be examined and the time available, it needs to have the benefit of the comments of the Committee of Experts before expressing its own views.

3.1.1.2 The Committee of Experts on the Application of Conventions and Recommendations

33. The Committee of Experts has often reiterated that its terms of reference do not require it to give definitive interpretations of Conventions, competence to do so being vested in the ICJ by article 37 of the Constitution.⁴⁷ In qualifying its function, the Committee has indicated that its task “is essentially specific and pragmatic, and is carried out in the context of an ongoing dialogue with governments”.⁴⁸ Two fundamental principles underlying its work have an important bearing on its role in matters of interpretation: (1) its tradition of independence, objectivity and impartiality, and (2) its function of determining whether the requirements of a Convention are being met; these requirements remain constant and uniform whatever the economic and social conditions of a given country, subject only to any derogations that are expressly permitted by the Convention itself.⁴⁹
34. In recalling that its terms of reference do not include the interpretation of Conventions, the Committee has indicated at the same time that, “in order to carry out its function of evaluating the implementation of Conventions, the Committee has to consider and express its views on the meaning of certain provisions of Conventions”.⁵⁰ The Committee has gradually taken on a more independent and broader role regarding interpretation as a result of the growing number of Conventions and ratifications.⁵¹ In addition, since 1950, the Committee of Experts

⁴⁵ *Ibid.* para. 24.

⁴⁶ *Ibid.*

⁴⁷ ILC, 63rd Session, 1977, Report III (Part 4A), Report of the Committee of Experts on the Application of Conventions and Recommendations, para. 32; ILC, 73rd Session, 1987, Report III (Part 4A), Report of the Committee of Experts on the Application of Conventions and Recommendations, para. 21. There is an evolution between the two reports: in 1977, the Committee indicated that it is not required to give interpretations, whereas in 1987 it specified that it is not required to give “definitive” interpretations.

⁴⁸ ILC, 78th Session, 1991, Report III (Part 4A), Report of the Committee of Experts on the Application of Conventions and Recommendations, para. 13

⁴⁹ ILC, 63rd Session, 1977, Report III (Part 4A), Report of the Committee of Experts on the Application of Conventions and Recommendations, para. 31; ILC, 73rd Session, 1987, Report III (Part 4A), para. 20.

⁵⁰ ILC, 63rd Session, 1977, Report III (Part 4A), *op.cit.*, para. 32; ILC, 73rd Session, 1987, Report III (Part 4A), *op.cit.*, para. 21.

⁵¹ GB.256 /SC/2/2, para. 26.

has undertaken general surveys that afford an opportunity to clarify the meaning of provisions of Conventions and to provide more detailed explanations than in individual comments.

35. The Committee has placed its role in matters of interpretation within the overall context of the functioning of the ILO standards system, having regard to the need for legal certainty. In so doing, it has raised the question of the legal effect of its comments: “in so far as its views are not contradicted by the International Court of Justice, they are to be considered as valid and generally recognised. (...) The Committee considers that the acceptance of the above considerations is indispensable to maintenance of the principle of legality and, consequently for the certainty of law required for the proper functioning of the International Labour Organisation”.⁵² This view generated intense discussions in the Conference Committee in the 1990s.⁵³ This led the Committee of Experts to specify that it does not regard its views as having the same authority as the decisions of a judicial body.⁵⁴ The Committee explained that, in making its earlier statement, its intention was to point out that member States should not contest its views on the application of a provision of a ratified Convention and at the same time refrain from using the procedure set out in article 37 of the Constitution to obtain a definitive interpretation of the Convention in question. The Committee of Experts emphasized that the result “would be legal uncertainty as to the meaning and scope of the provisions concerned as long as the question is not settled by a decision of the International Court of Justice; such a situation would be prejudicial to the certainty of law required for the proper functioning of the standard-setting system of the ILO.”⁵⁵
36. In addition to the question of the legal effect of its comments, an important procedural issue arises in relation to the role of the Committee of Experts in matters of interpretation, as “by the nature of things matters are not submitted to it publicly as an arbiter of the various interpretations that are possible through adversarial proceedings.”⁵⁶
37. To complete this overview, mention should be made of two occasions on which the Committee of Experts explicitly raised the possibility of submitting legal questions to the International Court of Justice: (1) the case of the application by the United Kingdom of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); and (2) the case of the application by the Federal Republic of Germany of the Discrimination (Employment and Occupation) Convention, 1958 (No.111). These are cases of exceptionally long-standing divergences between the governments concerned and the supervisory bodies on legal questions arising out of the implementation of ratified Conventions.

⁵² ILC, 77th Session, 1990, Report III (Part 4A), Report of the Committee of Experts on the Application of Conventions and Recommendations, para. 7.

⁵³ See para. 40 below.

⁵⁴ ILC, 78th Session, 1991, Report III (Part 4A), Report of the Committee of Experts on the Application of Conventions and Recommendations, para. 11. See also para. 12.

⁵⁵ *Ibid.* para. 11. See also para. 12.

⁵⁶ GB.256 /SC/2/2, para.28.

Text Box No. 2

Application by the United Kingdom of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87).

The legal issue at stake, raised by the Government, concerned the question of the relationship between the obligations under Conventions No. 87 and the Labour Relations (Public Service) Convention, 1978 (No. 151), which had both been ratified by the United Kingdom. The case was first brought before the Committee on Freedom of Association, which stated that, contrary to the Government's contention, "the exclusion of certain categories of workers in Conventions Nos. 98 and 151 cannot be interpreted as affecting or minimising in any way the basic right to organise of all workers guaranteed by Convention No.87. Nothing in either Convention No. 98 or Convention No.151 indicates an intention to limit the scope of Convention No. 87. On the contrary, both the terms of these Conventions and the preparatory work leading to the adoption of Convention No.98 show a contrary intention."⁵⁷ The Committee on Freedom of Association referred the legislative aspects of the case to the Committee of Experts. During its first examination, the Committee of Experts chose not to enter into the substance of the legal question. It took the view that it raised "complex legal issues which go beyond the specific matters raised under Convention No.87 (...); these issues involve difficulties in respect of which the International Court of Justice might more appropriately be requested to provide an opinion under the relevant provisions of the ILO Constitution". The conclusion was not reached without any difficulties, because the observation in which it is set out mentioned that three experts "reserved their positions as regards a possible request being made to the International Court of Justice for an opinion, and as regards the legal questions which such a request might raise".⁵⁸

It should be noted that the reference to the ICJ was made with a view to the settlement of a legal question rather than a dispute, even though in subsequent comments the Committee of Experts rejected the Government's argument. The Government did not take any initiative to have the case referred to the ICJ. During the individual examination of the case by the Conference Committee in 1985, the Government representative stated that the "fact that the Committee of Experts discussed the possibility of referring the interpretation of the Conventions to the International Court of Justice showed that, in its view, the arguments advanced by his Government were serious and substantial and merited further detailed consideration before a definitive view could be reached".⁵⁹ The Government maintained its legal contention over a period of 14 years. When it discussed the case,⁶⁰ the Conference Committee as a whole did not take a view on the legal question as such, but some of its members mentioned the possible referral of the question to the ICJ.

⁵⁷ Committee on Freedom of Association, 234th Report, Case No.1261, para. 364.

⁵⁸ ILC, 71st Session, 1985, Report III (Part 4A), Report of the Committee of Experts on the Application of Conventions and Recommendations, Part Two: Observations concerning particular countries, Observation regarding the application of Convention No. 87 by the United Kingdom, paras. 6 and 8.

⁵⁹ ILC, 71st Session, 1985, *Provisional Record* No. 30, Report of the Committee on the Application of Standards, Examination of individual cases, p. 30/5.

⁶⁰ Committee on the Application of Standards, Examination of individual case concerning Convention No. 87, Freedom of Association and Protection of the Right to Organise, 1948 by the United Kingdom (ratification: 1949), 1985, *idem* 1987 and 1989.

Text Box No. 3

Application by the Federal Republic of Germany of the Discrimination (Employment and Occupation) Convention, 1958 (No.111)

In this case, reference was made to the ICJ's role in matters of supervision (article 29 of the Constitution) rather than in matters of interpretation (article 37.1 of the Constitution). In practice, it makes no difference when there are divergences as to the meaning of certain provisions of Conventions that could potentially be referred to the Court.

The case concerned allegations that the law and practice in the Federal Republic of Germany regarding the duty of faithfulness to the free democratic constitutional order imposed on officials in the public service was contrary to the Discrimination (Employment and Occupation) Convention, 1958 (No.111). All the supervisory bodies examined the case, including a Commission of Inquiry established under article 26 of the Constitution. The Commission of Inquiry was explicitly called upon by the Government to examine questions of interpretation of specific provisions of the Convention. The Government did not accept the conclusions of the Commission of Inquiry (or indeed of any of the supervisory bodies). At the same time, it explicitly indicated that it did not want to use the possibility under article 29 of the Constitution to resort to the ICJ. Rather, it would continue to report on the relevant questions under the regular supervisory procedure. When faced with this situation in the follow-up of the recommendations made by the Commission of Inquiry, the Committee of Experts stated that the "ILO Constitution does not make the results of an inquiry subject to the consent of the State concerned. The Government's position therefore does not affect the validity of the conclusions of the Commission of Inquiry. The ILO Constitution provides an opportunity for an appeal to the International Court of Justice (...), but the Government chose not to avail itself of that possibility".⁶¹ When it discussed the case in 1988, the Conference Committee as a whole expressed regret at the position taken by the Government in relation to the report of the Commission of Inquiry.⁶²

3.1.1.3 The issue of interpretation and the relationship between the Conference Committee and the Committee of Experts

38. In examining the respective roles of the Committee of Experts and the Conference Committee on the Application of Standards, it is necessary to address the specific interaction between these two bodies, which is the core feature of the regular supervisory procedure, in view of its importance in the contribution that they make to the interpretation of Conventions.
39. When the two Committees were created in 1926, emphasis was placed on the informative nature of the regular supervisory procedure in comparison to the other supervisory procedures for the examination of representations and complaints. Neither of the Committees could therefore be considered either as a court or a Commission of Inquiry. In their early years, the regular supervisory bodies both undertook the successive examination of the reports submitted by governments and adopted a cautious attitude to matters of interpretation. Both Committees confined themselves to drawing the attention of the Conference and the Governing Body to cases in which there was a divergence of interpretation between member

⁶¹ ILC, 75th Session, 1988, Report III (Part 4A), Report of the Committee of Experts on the Application of Conventions and Recommendations, Part Two: Observations concerning particular countries, Observation regarding the application of Convention No. 111 by the Federal Republic of Germany, para. 7(a).

⁶² ILC, 75th Session, 1988, Committee on the Application of Standards, Examination of individual case concerning Convention No. 111, Discrimination (Employment and Occupation), 1958 Federal Republic of Germany (ratification: 1961).

States. The Conference Committee emphasized in 1933 that this situation was not entirely satisfactory when faced with persistent divergences.⁶³

40. This duplication of examination has progressively been replaced by complementarity between the work of the two Committees, under the effect of the increase in their workload and the differences in their composition and methods of work. In the 1990s, when discussing the question of the legal effects of the comments of the Committee of Experts, the Conference Committee comprehensively debated the consequences of this complementarity with regard to the question of their respective roles in matters of interpretation.⁶⁴ Two different views emerged. One was that the Conference Committee contributed to the interpretation of Conventions through its own independent role and mandate, while the second was that the Conference Committee did not engage in independent legal analysis, in contrast with the Committee of Experts, which offered the stability and impartiality indispensable for the interpretation of Conventions. Proponents of the first view emphasized that the Conference Committee was not bound by the comments of the Committee of Experts, even though its opinions carry considerable weight. Proponents of the second view contended that, while the views of neither committee had force of law, the comments of the Committee of Experts were generally accepted because of its composition and methods of work. They further noted that any disagreement as to the views expressed by the Committee of Experts on matters of interpretation should be brought before the ICJ, and that it was not for the Conference Committee to question the legal views of the Committee of Experts.
41. Overall, there was general recognition that dialogue and cooperation between the two committees and the absence of hierarchy between them were key elements, including in matters of interpretation.

3.1.2 The special supervisory procedures

3.1.2.1 Commissions of Inquiry appointed by the Governing Body to examine complaints under article 26 of the Constitution

42. Commissions of Inquiry are the only supervisory bodies of which explicitly mention is made in the ILO Constitution. Their composition is similar to that of the Committee of Experts, although the procedure applicable for the examination of complaints under article 26 of the Constitution is of a judicial nature and the proceedings before Commissions of Inquiry are of an adversarial nature. Commissions of Inquiry can therefore make an important contribution to the interpretation of Conventions. In practice, they tend to rely on the indications provided by the Committee of Experts in its general surveys, as well as on the comments of the Committee on Freedom of Association. However, as emphasized in the 1993 study,⁶⁵ there is one limitation to their role: Commissions of Inquiry

⁶³ ILC, 17th Session, 1933, *Record of Proceedings*, Report of the Committee of Experts on Article 408 of the Treaty of Versailles, Appendix V, para. III, p. 520.

⁶⁴ ILC, 76th Session, 1989, General Report of the Conference Committee on the Application of Conventions and Recommendations, paras. 12-23; ILC, 77th Session, 1990, General Report of the Conference Committee on the Application of Conventions and Recommendations, paras. 20-35; ILC, 78th Session, 1991, General Report of the Conference Committee on the Application of Conventions and Recommendations, paras. 13-39.

⁶⁵ GB.256/SC/2/2, para. 32.

are ad hoc bodies with an ad hoc composition. Their determination of the meaning of a provision of a Convention necessarily depends on the circumstances of the case and the individuals comprising the Commission.

3.1.2.2 Tripartite committees of the Governing Body appointed to examine representations under article 24 of the Constitution

43. As shown by the two examples set out below, these tripartite supervisory bodies also contribute to the interpretation of Conventions, although in so doing they rely to a certain extent on the work of the Committee of Experts. They offer an advantage in matters of interpretation, as their procedure allows the two parties to present their points of view and to furnish further information at the request of the tripartite committee. Nevertheless, there are limitations to their role in this regard in practice. First, they are ad hoc committees and their members do not necessarily have a legal background. In addition, as they are convened during Governing Body sessions, when their members also have other responsibilities, their discussions take place under significant material constraints. Moreover, the reports of tripartite committees are submitted for approval to the Governing Body, which has traditionally held that it is not entitled to approve interpretations.⁶⁶ In practice, however, the Governing Body approves the reports of tripartite committees without modification, as for example in the case of the reports of the Committee on Freedom of Association. The comments made by members of the Governing Body on such reports are recorded in confidential minutes.

⁶⁶ *Ibid.*, para. 13.

Text Box No. 4

Representation submitted under article 24 of the ILO Constitution concerning the application by the Netherlands of the Equality of Treatment (Social Security) Convention, 1962 (No. 118)⁶⁷

The representation was lodged following the termination of the payment of a supplementary benefit established under the national legislation, to recipients of the Netherlands permanent disability benefit residing in Turkey. An earlier decision by the highest court of the Netherlands in social security matters (the Central Court of Appeal) had determined that the Government was in breach of the Convention, and in particular Articles 3(1) and 5(1). Just before the representation was lodged, the Government had communicated a statement to the Office on the scope of its obligations under the Convention in relation to the same supplementary benefit. Noting that the Committee of Experts was due to examine the legal implications of the Government's statement, the Governing Body decided to defer its decision to establish a tripartite committee in order to have at its disposal the technical analysis of the Committee of Experts. The Committee of Experts considered the Government's statement, which it deemed valid.

The technical analysis of the Committee of Experts and the information obtained through the report under article 22 provided the necessary legal basis for consideration of the matter by the tripartite committee that was eventually established by the Governing Body.⁶⁸ The tripartite committee found that the Netherlands was in full compliance with Article 3(1). With regard to the application of Article 5(1), the committee noted the specificity of the Dutch social security system, which combines traditional branches of social insurance covering particular risks with the universal scheme guaranteeing minimum family income to all residents, irrespective of the risk suffered. A number of social provisions, including the supplementary benefit, ensure a guaranteed minimum level of income. The tripartite committee concluded that the purpose, structure and specific features of the supplementary scheme make it distinct from the traditional branches of social security. This led the tripartite committee to find that the supplementary benefit does not fall within the scope of the branches of social security to which Article 5(1) applies and that the supplementary benefit as a whole falls outside the scope of the Convention. The tripartite committee accordingly followed the "restrictive interpretation" of the scope of the invalidity benefit given by the Committee of Experts, as opposed to the "inclusive interpretation" adopted by the Central Court of Appeal. In so doing, the tripartite committee recalled that it is primarily for the member State concerned to judge whether or not its national law and practice are or can be compatible with the provisions of the international labour Convention in question, subject to the ILO supervisory proceedings.⁶⁹ The tripartite committee concluded that the Government was not in breach of the Convention, as the supplementary benefit falls outside the scope of application of the Convention.

⁶⁷ GB.298/15/7. Further details of this case can be found in the Appendix to GB.303/LILS/4/2, Case study No. 7: Social security (Netherlands).

⁶⁸ In December 2004, the Government deposited an instrument of denunciation in relation to the Convention, which took effect in December 2005. Nevertheless, the tripartite committee continued its consideration of the representation, limiting its examination to the period prior to the denunciation taking effect, which it determined that it was still competent to consider.

⁶⁹ GB.298/15/7, paras. 45-46.

Text Box No. 5

Representation submitted under article 24 of the ILO Constitution concerning the application by France of Conventions Nos 87, 98, 111 and 158⁷⁰

The representation was submitted following the adoption of national legislation including an ordinance relating to the contract for new employment for enterprises with fewer than 20 employees (hereinafter the CNE). The main issue at stake was to determine whether the CNE, which allowed employers a two-year period in which they could terminate the employment of their employees without providing a reason, infringed Article 4 of Convention No. 158, under which employment shall not be terminated unless there is a valid reason for such termination. More specifically, the tripartite committee set up by the Governing Body had to determine whether a period of probation or a qualifying period of two years, during which employed persons may be excluded from the provisions of the Conventions, was “reasonable” in accordance with Article 2(2)(b) of the Convention. The tripartite committee held that this question was to be determined “by each country for which the Convention is in force, having due regard to the object of the Convention, which is to protect all employees in all branches of economic activity against unjustified dismissal.”⁷¹ On the basis of national case law, the tripartite committee held that the qualifying period for employment in France normally does not exceed six months. It therefore concluded that two years could not be considered a reasonable qualifying period of employment on the basis of Article 2.2(b) of the Convention, and that the absence of a valid reason for the termination of employment was contrary to Article 4 which, according to the Committee of Experts, is the “cornerstone” of the Convention.

In following up the recommendations of the tripartite committee, the Committee of Experts confirmed the finding of the tripartite committee that there was insufficient basis for considering the period of consolidation of employment as a “qualifying period of employment” of “reasonable duration”, within the meaning of Article 2, paragraph 2(b), of Convention No. 158, and that the CNE significantly departed from the requirements of Article 4 of the Convention, which is “the cornerstone of the Convention’s provisions”. In 2008, the Committee of Experts noted with satisfaction in an observation the information provided by the Government concerning the measures adopted to take into account the recommendations of the tripartite Committee.⁷²

⁷⁰ GB.300/20/6. In accordance with article 3 (2) of the Standing Orders, the allegations concerning Conventions Nos. 87 and 98 were referred to the Committee on Freedom of Association. The CFA noted in its 348th Report (November 2007) that the CGT-FO had withdrawn its complaint following the cancellation of the Ordinance in question finding in favour of the union. The CFA noted this information with satisfaction and decided to withdraw the complaint.

⁷¹ GB.300/20/6, para. 68.

⁷² Including the judgment of 1 July 2008 (No. 1210) of the Social Chamber of the Court of Cassation, which found that the CNE is contrary to Convention No. 158 and that an employee cannot be dismissed without a valid reason.

3.1.2.3 The Committee on Freedom of Association of the Governing Body

44. Like the ad hoc committees set up under Article 24 of the Constitution, the Committee on Freedom of Association has a tripartite composition which evidently has an impact on its conclusions and recommendations. In addition, it brings with it a long and vast experience in elaborating freedom of association principles which, while they are indeed relevant to the understanding of the meaning of the relevant Conventions, are not limited to those Conventions given the Committee's responsibility for reviewing the application of those principles even in the absence of ratification.
45. The nature of the Committee's work is distinguished by the fact that it is a complaints-based mechanism and thus called upon to draw conclusions in respect of concrete cases. In the case of ratification of freedom of association Conventions, the Committee often draws upon those conventions relevant to the specific case and also refers to determinations that may have already been made by the Committee of Experts. The Committee also often refers the legislative aspects of a case following its initial analysis to the Committee of Experts for further follow-up within the framework of the latter Committee's role of supervising the application of ratified Conventions. It is evident that this analysis has an impact on the understanding of the meaning of relevant standards in concrete cases.
46. The Committee's role however goes beyond, and is different from, the mere question of the application of Conventions. On the basis of the complaints brought before it, the Committee, during its deliberations and on the basis of tripartite consensus, has an additional role of facilitating resolution on the basis of the principles that it has elaborated over nearly 60 years. Often the Committee does not indicate the precise steps to be taken, but recommends the Government and the social partners to review the situation in the light of the general principles set out in its conclusions in order to find mutually acceptable solutions.
47. The diversity of the over 2,750 cases received by the Committee therefore results in reflections and conclusions relating to the nature of freedom of association in a broader manner than the other supervisory mechanisms are called upon to undertake. In many ways, this quasi-facilitator role is a reflection of the initial intention in the creation of the Fact-finding and Conciliation Commission on Freedom of Association whose role has been largely filled since its creation by the Committee on Freedom of Association. In the light of the above considerations, it is clear that the Committee has a limited role in interpreting Conventions as such, but rather serves as the authoritative international voice in establishing the basic principles of freedom of association and assisting countries in putting in place more harmonious labour relations systems based thereon.

3.1.3 The interpretative practice of the supervisory bodies

48. Given its central role in clarifying the meaning of Conventions, the practice followed by the Committee of Experts in relation to matters of interpretation is addressed briefly below. While the practice of the other supervisory bodies

generally follows the same pattern, they rely greatly on the views of the Committee of Experts, of which they make systematic use.⁷³

49. However, when considering the practice of the Committee of Experts in this respect, it should be borne in mind both that it does not have the formal mandate to interpret international labour Conventions and that its views on the meaning of Conventions are not the result of an open and adversarial procedure, during which all the interested parties can express their views on the methods of interpretation that are most relevant to the question under consideration.
50. The Committee of Experts has indicated that it “bears in mind constantly all the different methods of interpreting treaties”.⁷⁴ During the 96th Session (2007) of the Conference, in reply to comments made on the General Survey concerning the Forced Labour Conventions, the Chairperson of the Committee of Experts indicated that “in interpreting Conventions, their terms and purposes had to be taken into consideration, as they were living instruments which had not to be interpreted solely in the context of the prevailing conditions which existed at the time of their adoption.”⁷⁵
51. A cursory examination of the reports of the Committee of Experts confirms the flexible approach adopted in this respect, which is neither exceptional nor surprising under international law. As is the case in any interpretative process, the Committee of Experts starts with the actual terms of the text in their context and in light of the purpose of the Convention, paying due regard to the two authentic language versions of the Convention. It may consider the preparatory work, either because it contains an explicit clarification of the meaning of a particular concept or confirms the meaning determined by the Committee. To a lesser extent, the Committee of Experts has taken into account the opinions given by the Office in reply to requests by constituents for clarifications either during the process leading to the adoption of the Convention or thereafter. The conclusions of other supervisory bodies have generally been referred to by the Committee of Experts in support of its own conclusions. There has only been one instance in which the Committee of Experts has referred to the Vienna Convention on the Law of Treaties, 1969. This concerned the determination of the meaning of the concept of “substantial equivalence” used in the Merchant Shipping (Minimum Standards) Convention, 1976 (No.147).

⁷³ This is mostly the case for tripartite committees and Commissions of Inquiry (although, as indicated earlier, the situation is different for the Conference Committee and the Committee on Freedom of Association).

⁷⁴ ILC, 78th Session, 1991, Report III (Part 4A), Report of the Committee of Experts on the Application of Conventions and Recommendations, para. 13.

⁷⁵ ILC, 96th Session, 2007, *Provisional Record* No. 22 (Part One), Report of the Committee on the Application of Standards, para. 133.

Text Box No. 6

Reference by the Committee of Experts to the Vienna Convention on the Law of Treaties, 1969

On one specific occasion, the Committee of Experts referred to the Vienna Convention on the Law of Treaties. In its 1990 General Survey on Labour Standards on Merchant Ships, the Committee provided a clarification with regard to the notion of “substantial equivalence” as used in the Merchant Shipping (Minimum Standards) Convention, 1976 (No.147). Before determining the meaning of the notion, the Committee of Experts made its standard statement that definitive authority to interpret Conventions is vested with the ICJ under article 37 of the Constitution. However, it stated that in order to carry out its function of determining whether the requirements of Conventions are being observed, it had “to consider and express its views on the content and meaning of their provisions and determine their legal scope where appropriate”.⁷⁶ The Committee in this instance referred to the preparatory work of other international labour standards in which the notion of substantial equivalence first surfaced, as well as the preparatory work of Convention No. 147, including the views expressed by the Legal Adviser at the time of adoption of the Convention and information contained in Government reports submitted under articles 19 and 22 of the ILO Constitution. In order to clarify the meaning of substantial equivalence, it also stated that “it does also seem desirable as a matter of principle and in the spirit of Article 31(1) of the Vienna Convention to refer to the ‘ordinary meaning’ of the words in their context and in the light of the object and purpose of Convention No. 147”.⁷⁷ It should be noted in this respect that the notion of “substantial equivalence” is defined in Article VI, paragraph 4, of the Maritime Labour Convention, 2006.

⁷⁶ ILC, 77th Session, 1990, Report III Part 4B, Report of the Committee of Experts on the Application of Conventions and Recommendations, General Survey on Labour Standards on Merchant Ships, Chapter II, para. 65

⁷⁷ *Ibid.* para. 71.

52. In the Conference Committee's discussions on the interpretative practice followed by the Committee of Experts, different views emerged. Some members took the view that the Committee of Experts had to apply the Vienna Convention, rather than referring to the similarity of views expressed in this respect by the various supervisory bodies. They recalled that, under the Vienna Convention, the wording of a provision of international law determines its meaning, unless the parties to the treaty decided otherwise, and that the preparatory work is of secondary importance. They added that the ILO has not established its own rules for the interpretation of its Conventions. Other members questioned the use of the Vienna Convention, emphasizing that international labour Conventions are international treaties drafted and supervised in a tripartite context. They expressed the view that the practices developed by the supervisory bodies should prevail, and especially the constructive dialogue that had developed between them. Other members emphasized that it is important to introduce an inter-temporal element in the interpretation of Conventions. Certain Conventions, by reason of their importance, have to be treated as living documents, with interpretation reflecting changing realities or taking into account subsequent practices.⁷⁸

3.2 The role of the Office

53. Almost since the creation of the International Labour Organization, the Office has provided opinions in response to requests for clarification by constituents concerning the meaning of certain provisions of Conventions.⁷⁹ Despite being non-authoritative, the Office's opinions or clarifications serve an important, if limited, role in the standards system. The Office usually has the advantage of the technical means, the linguistic capacity and a measure of practice in interpretation that allows it to provide well-researched and considered replies to requests for clarification from Members. This service is particularly important for Members when they are contemplating the ratification of a Convention.

54. The approach used by the Office to provide opinions is set out in an internal circular: Circular No. 40, Series A, dated 15 September 1987, on the Procedure concerning the requests for interpretations of Conventions and Recommendations.⁸⁰

55. The Circular states that the reply from the Office should as a rule comprise the general reservation that the opinion of the International Labour Office is provided "subject to the usual reservation that the Constitution of the International Labour Organisation confers no special competence upon the International Labour Office to give an authentic interpretation of the provisions of Conventions adopted by the International Labour Conference".⁸¹ In addition, in practice, the opinions issued by the Office contain another standard reservation that they are also provided based on the explicit understanding that any decision on the conformity of national legislation and practice with a particular Convention must rest, in the first

⁷⁸ ILC, 77th Session, 1990, *Record of Proceedings*, General Report of the Conference Committee on the Application of Standards, paras. 24-77.

⁷⁹ GB. 256/SC/2/2, paras. 11 to 18.

⁸⁰ This circular was preceded by two others; Director-General's Instruction No. 337 of 11 January 1968 and Director-General's Instruction No. 45 of 23 December 1952. The main evolution relates to the difference in the form of the reply, i.e. formal and informal opinions.

⁸¹ *Ibid.* para. 10

instance, with the Government of the country concerned subject, in the case of the ratification of the Convention, to the comments made by the supervisory bodies. In this manner, the Office has been careful not to prejudice any subsequent decisions by the ICJ or conclusions of the supervisory bodies.

56. In determining the meaning of the provisions of Conventions, the Office has regard to the same elements as the supervisory bodies. It takes the actual terms of the text as a point of departure. In addition, the circular indicates that account shall be taken of:

“(a) the preparatory work which preceded the adoption of the Convention or Recommendation in question, in particular the various reports submitted to the International Labour Conference (...) and the minutes of the discussion;
(b) the extent to which law and practice in countries other than the one making the request may assist in clarifying the problems at issue;
(c) any earlier interpretations and any comments of a supervisory body;
(d) any other relevant technical information and technical considerations.”⁸²

57. Under the terms of the circular, some of the Office’s opinions are described as “formal or official” opinions. They are submitted to the Governing Body and published in the Official Bulletin, either upon specific request or when the issue raised is likely to be of general interest, unless it is explicitly indicated that the guidance provided should be unofficial.⁸³ A total of 147 formal or official opinions have been published since 1921. Of these, 72 per cent have been provided when the ratification of the Convention in question was being considered. The proportion of requests made prior to ratification and those concerning Conventions that have already been ratified has varied over time. Between 1988 and 2002, only three opinions were submitted to the Governing Body and published in the Official Bulletin, all of which addressed requests made prior to ratification. Since 2002, no opinions have been submitted to the Governing Body or published in the Official Bulletin.⁸⁴

58. In comparison, there has been an increase in the number of unpublished opinions provided by the Office since the mid-1980s. They now constitute a substantial component of the technical assistance provided by the Office in relation to standards. They are provided in response to requests made mainly by governments, but also by employers’ and workers’ organizations. The vast majority of the requests made by governments concern questions arising at the pre-ratification stage. Most relate to the more technical Conventions. The corresponding clarifications are communicated directly to the requesting party and are not made available in any other way. Their increase does not seem to relate to the nature of the issues raised, but may be attributable to the increasingly informal and frequent exchanges between the Office and constituents. These clarifications

⁸² ILO Circular No. 40, Procedure concerning the requests for interpretations of Conventions and Recommendations, 15 September 1987, para. 7.

⁸³ In most cases, formal or official opinions have been confined to requests submitted by governments.

⁸⁴ The 1993 study explains that the practice of submitting opinions to the Governing Body was discontinued in view of the questions raised by its members on the appropriateness of such submission (GB.256/SC/2/2, para.15). The absence of publication appears to be due to the fact that governments have not specifically requested official opinions since 2002 and that the Office has not considered that the issues raised are of general interest.

are difficult to quantify or categorize, as requests are received through various channels and various Office units, both at Headquarters and in the field.

59. The practice of the provision of opinions by the Office, as well as its legal authority and the method of distribution of the opinions have been discussed in the Governing Body.⁸⁵ As pointed out earlier, the real value of the Office's role is to provide technical assistance to member States based on thorough research and analysis of the matter in question.

60. The 1993 study concluded that "the ILO's established internal procedures include interpretation machinery of a rare degree of diversity and richness."⁸⁶ This internal interpretation machinery has acquired importance over the years and can be said to have become indispensable, because it operates mainly through the highly developed ILO supervisory system. It has the advantage of relying on a pragmatic and flexible approach closely related to the regular supervision of the application of international labour standards. It also relies on coordination between all the bodies involved. On the other hand, none of the internal bodies "meets all the conditions necessary to enable it to provide a definitive settlement of controversies concerning the meaning to be given to the provisions of a Convention".⁸⁷

4. Developments relating to the use of international labour standards outside the ILO and possible implications on their interpretation

61. The increasing use of international labour standards outside the ILO is a development that may have an impact on the standards system. Two types of such usage are reviewed briefly below as they illustrate that the question of the interpretation of international labour Conventions may also have a dimension outside the ILO.

4.1. Use of international labour standards in domestic courts

62. The role of national courts in applying and interpreting national laws that give effect to international labour standards is an important means of enforcing ILO standards.⁸⁸ In recent years, the ILO has increased its efforts to help national courts make greater use of international labour standards and the comments of the ILO supervisory bodies. Training programmes on international labour standards for judges, lawyers and legal practitioners are conducted by the International Training Centre (ITC) in Turin.
63. A broad variety of jurisdictions are called upon to settle disputes involving labour-related questions at the national level and can therefore make use of ILO standards

⁸⁵ GB.224/PV(Rev.), pp.IV/8-9. The 1993 paper analyses three main aspects of this practice: its justification, legal effect and the applicable arrangements. GB.256/SC/2/2, paras. 11- 18.

⁸⁶ GB.256/SC/2/2, para. 33.

⁸⁷ *Ibid.*

⁸⁸ For example, Article 22 report forms request member States to state whether courts of law or other tribunals have handed down decisions involving questions of principle relating to the application of ratified Conventions.