

The standard-setting and monitoring activity of the ILO: Legal questions and practical experience¹

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Internationalization and globalization have long had a growing impact on many areas of life, especially on legal and economic relations. Although the International Labour Organization (ILO) has been active in this field for 86 years, its main focus being on social policy, it is only moderately well known in many member States, and its activities appear to have a limited influence. There are reasons for this, which must be identified.

The ILO's methods of work and the practical results thereof are not well known, notably the actual contents of the ILO's numerous international labour standards, even inside the member States which have ratified them.² Moreover, it is particularly difficult to see how these texts take effect within the legal systems of the individual States.

This article attempts to spell out reasons for these shortcomings. The author's experience leads him to maintain that to some extent

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² Despite the comprehensive work of Nicolas Valticos (*Droit international du travail*, 2nd edition, Paris, Dalloz, 1983) or, more recently, major academic papers like those of Niklas Dominik Wagner (*Internationaler Schutz sozialer Rechte, Die Kontrolltätigkeit des Sachverständigenausschusses der IAO*, Dissertation, Max-Planck-Institut für ausländisches und internationales Sozialrecht, Study No. 23, Baden-Baden, Nomos Verlag, 2002) and Stefan Brupbacher (*Fundamentale Arbeitsnormen der Internationalen Arbeitsorganisation, Eine Grundlage der sozialen Dimension der Globalisierung*, Zürcher Dissertation, Bern, Stämpfli, 2002) or shorter contributions to commemorative publications, e.g. Alfred Wiskirchen: "Ausgewählte Fragen der Normenüberwachung", in *Weltfriede durch soziale Gerechtigkeit, 75 Jahre Internationale Arbeitsorganisation*, Baden-Baden, Nomos Verlag, 1994, pp. 65-75.

these reasons lie in the existing methods of work of the ILO and the results these have led to. To some extent, also, they originate in the structure and mode of operation of international law. The following close examination of how standards are established and compliance supervised will include consideration of these questions.³

Major elements in the structure of the ILO

Antecedents and the Constitution of the ILO

The document laying the foundations of the ILO was Part XIII of the Peace Treaty of Versailles.⁴ The new organization became part of the League of Nations and, since 1946, has been a specialized agency of the United Nations. Its guiding ideas, aims and motives are clearly formulated in the preamble to the ILO Constitution. Two crucial aspects are immediately identified in the opening statement of the preamble: “Whereas universal and lasting peace can be established only if it is based upon social justice.” The wish to secure lasting peace in the comprehensive treaty ending the First World War was obvious and completely natural. It was felt that this peace could be imperilled not least by unjust working conditions and therefore an urgent call was made for an improvement of these conditions in such important areas as the regulation of working hours, the prevention of unemployment, the provision of an adequate living wage, the protection of certain groups of workers and the principle of the freedom of association (second preambular paragraph of the ILO Constitution). Shortly before the end of the Second World War, in May 1944, the 26th Session of the International Labour Conference adopted a “Declaration concerning the aims and purposes of the International Labour Organisation” and the principles which should inspire the policy of its Members. This “Declaration of Philadelphia” confirmed and expanded on the Organization’s principles and responsibilities in the field of social policy as laid down in the original Constitution. The Declaration is annexed to, and is part of, the ILO Constitution (article 1, paragraph 1).

However, the ideas for setting international standards in labour law and social policy go right back to the nineteenth century.⁵ The Inter-

³ Long-time ILO-insider William Simpson provides a most impressive and highly critical analysis in *Mélanges en l’honneur de Nicolas Valticos*, Geneva, ILO, 2004, pp. 47 ff. He virtually castigates the mass production of instruments, which he alleges are of low quality, too detailed and therefore barely ratifiable. Moreover, he considers the supervision of the high number of ratifications is unsatisfactory in many respects. All in all, it is remarkable how many of his critical points and suggestions for treatment concur with my own observations.

⁴ *The Treaty of Peace between the Allied and Associated Powers and Germany*, London, H.M. Stationery Office, 1919, Part XIII, pp. 387-411.

⁵ Wagner, op. cit., p. 41; and Edward E. Potter: “Renewing international labour standards for the 21st century”, in *Zeitschrift für Arbeitsrecht*, 2001, p. 205.

national Labour Conference, held in Berlin in 1890, represented a genuine attempt at reaching such agreements. However, it concluded with a list of hopes and recommendations. The significance of this attempt was variously evaluated both at the time and a hundred years later on the occasion of a meeting to commemorate the 1890 Conference.⁶

For a long time, standard setting in this area was mostly greeted with scepticism, because it did not seem possible to supervise and to enforce these instruments. Ultimately, however, the aim of preventing States with poor social standards from gaining a competitive advantage over States with higher ones by establishing international minimum standards proved stronger.⁷ The ILO Constitution plainly expresses the same idea of fair competition, albeit in rather old-fashioned language: “Whereas also the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries” (third preambular paragraph of the ILO Constitution). The demand for uniform working conditions in a heterogeneous world is, however, still problematic.⁸

The organs and special characteristics of the ILO

The main organs of the ILO are the annual General Conference, the Governing Body and the International Labour Office (article 2 of the ILO Constitution). The Conference, as the supreme organ, consists of representatives of all the 178 States which are currently Members and, like all important bodies of the Organization, comprises Government, Employers’ and Workers’ delegates. At the Conference, each country has two Government delegate seats, one Employers’ delegate seat and one Workers’ delegate seat. The distribution of votes – half for the Government and the other half for Employers and Workers – in fact also applies in the Governing Body, which is made up of 28 Government representatives, ten of whom come from States of chief industrial importance, 14 Employers’ representatives and 14 Workers’ representatives (article 7 of the ILO Constitution). The third organ is the International Labour Office headed by a Director-General, which has several regional and local offices in addition to its seat in Geneva.

⁶ The main papers and their discussion are documented in *Zeitschrift für Arbeitsrecht (ZfA)*, 1991, pp. 323 et seq. See also Rolf Birk: “Arbeitnehmerschutz – vom internationalen zum supranationalen Recht”, in *ZfA*, 1991, pp. 356 et seq.; and Max Kern: “Zur Wirkungsgeschichte der Arbeiterschuttkonferenz in internationalen Bereich”, in *ZfA*, 1991, pp. 323 et seq.

⁷ An interesting parallel: in the original treaty setting up the European Economic Community (EEC) of 25 March 1957, one aspect of working hours, “paid holidays”, was one of the few specific labour-law rules, together with equal pay for men and women (Article 119) to be included at the wish of France in Article 120 (now Article 143) of the Treaty of Rome. The underlying reason was again competition in the context of minimum social rules.

⁸ Birk, op. cit., p. 360.

The International Labour Office has some 2,000 members of staff at present.

One special characteristic and a constant of the ILO is the above-mentioned tripartite membership of all organs, which is reflected in the composition of bodies and the voting rights associated therewith. Particular emphasis must be placed on the independent behaviour of Employers' and Workers' representatives and especially on their independence from their Governments, which is rooted in the principle of the freedom of association. That is why governments may nominate representatives of both sides of industry as delegates to the International Labour Conference only with the agreement of leading national industrial organizations of employers and workers (article 3, paragraph 5, of the ILO Constitution). If a member State sends an incomplete delegation consisting of only one Employers' representative, or only one Workers' representative alongside the Government delegate, the social partners' delegate attending the Conference loses his or her right to vote (article 4, paragraph 2, of the ILO Constitution). The tripartite principle is complemented by the strictly observed principle of group autonomy. This autonomy is evident in the provisions on Employers' and Workers' representatives in the Governing Body (article 7, paragraph 4, of the ILO Constitution) and in numerous articles of the Standing Orders of the International Labour Conference regarding the Officers of the Conference, the composition of committees (apart from the Finance Committee which consists solely of Government representatives), the officers of committees and voting rules.

The conference committees, where the crucial, substantive work is done, all have tripartite membership, with each of the three groups enjoying an equal voting weight (article 65, paragraph 2, of the Standing Orders). This means that if the Employers' and Workers' groups are in agreement, they have a two-thirds majority without the Government representative.⁹

Standards setting

Procedure

For many decades, the ILO's main pursuit was the preparation and adoption of international labour standards in the form of Conventions and Recommendations. While there is now an official corpus of 185 Conventions, five Protocols and 196 Recommendations, some Con-

⁹ See also Brupbacher, *op. cit.*, pp. 48 et seq., with regard to tripartism as a constitutive feature of the ILO, to the strength of the social partners and to the noticeable differences in group cohesion between employers and workers.

ventions have never entered into force and many have been shelved or withdrawn.¹⁰

The formal procedure for, and sequence of events in formulating these standards comprise the following main steps. The Governing Body decides to place the examination of a specific question on the agenda of a forthcoming International Labour Conference and identifies various preparatory steps which it deems appropriate. This preparation generally includes a study by the Office of existing laws and practices in member States. In addition, the Office asks member States whether and how they would like to have a set of issues regulated. A preliminary draft is then made, which is given a first reading and possibly amended during the International Labour Conference by a technical committee set up to deal with this agenda item. A second reading normally follows the next year, in the course of which the competent committee establishes the formal character of the standard (a Convention or a Recommendation) (articles 38 and 39 of the Standing Orders of the International Labour Conference). The final adoption of a Convention or Recommendation requires a two-thirds majority of the votes cast by the delegates present (article 19, paragraph 2 of the ILO Constitution). Four years usually elapse between deliberations in the Governing Body and the Conference's final decision.¹¹

The two-thirds majority required for the passing of a new instrument by the full Conference is regularly achieved, because Governments (which hold half of the votes) and Workers usually agree to the text. This occasionally happens even when a government is determined to reject ratification in its own country. One argument for this practice is that they do not wish to obstruct the use of a Convention by other States. This line of action would, however, still be open to these States even if a Convention were rejected. According to article 21 of the ILO Constitution, Members may agree among themselves to such a Convention, even when it has not secured the support of two-thirds of the votes cast. A Convention so agreed must be communicated by the governments concerned to the Director-General of the International Labour Office and to the Secretary-General of the United Nations for registration in accordance with Article 102 of the Charter of the United Nations. The behaviour of many governments from developing countries is astonishing. On the whole, they tend to agree to new norms – even when they contain high standards – and subsequently ratify these agreements.¹²

¹⁰ See below, pp. 261 and 265.

¹¹ For more details, see Alfred Wisskirchen and Christian Hess: *Employers' handbook on ILO standards-related activities*, Bureau for Employers' Activities (ACT/EMP), ILO, Geneva, 2001, pp. 13 et seq., with a model schedule on p. 16.

¹² Birk, op. cit., p. 360, footnote 33: "Bei manchen Staaten wundert man sich über die Ratifizierungseifer" (Many States' keenness to ratify is surprising).

According to the standard final provisions which have been incorporated in Conventions since the 11th Session of the International Labour Conference of 1928,¹³ an agreement enters into force 12 months after two ratifications have been registered with the Director-General of the International Labour Office. There are a few exceptions to this basic rule; this is true, above all, of Conventions concerning seafarers.¹⁴ Conventions Nos. 31 and 47 required ratification by at least two of seven specifically named European States.

Conventions become binding on every member State which has ratified them. The effects of ratification within a State depend on the latter's constitutional law. In Germany, for example, an Act is needed for the ratification of an international agreement and its incorporation into national law (Article 59, paragraph 2, of the Basic Law). In international law, opinions vary greatly on this topic and ILO bodies have altered their position over the years.¹⁵ An implementing law can be dispensed with only in the rare cases of provisions being self-executing.¹⁶

As far as implementation at national level is concerned, article 19, paragraph 5(d), of the ILO Constitution stipulates that a Member must inform the Director-General of ratification and "will take such action as may be necessary to make effective the provisions of such Convention". The individual Conventions contain diverse wording in this respect, but most of them mention legislation, collective agreements, arbitration and court rulings as alternative means of implementation.

Recommendations which, until 1970, were issued solely as a supplement to a Convention, cannot be ratified and remain, as their name clearly suggests, non-binding. Every issue is thrashed out in the competent technical committee of the International Labour Conference, where wording is often a matter of tough, intense negotiation right up to the last minute. After difficulty in reaching agreement on the content of a Convention, lack of time has sometimes led to all the remaining outstanding points being lumped together, without thorough examination, in an accompanying Recommendation. Consequently, the content of a good many Recommendations is not exactly consistent or meaningful.

¹³ Printed in *International Labour Conventions and Recommendations, 1919-1991*, Volume I, Appendix I, pages IX-X.

¹⁴ For example, the precondition for the entry into force of Convention No. 147 was ratification by ten member States which, together, accounted for 25 per cent of world gross shipping tonnage. Legally speaking, Convention No. 147 is most interesting, because in the final analysis it affects member States which have not ratified it.

¹⁵ In this connection, for greater detail see Wagner, *op. cit.*, pp. 102 et seq.

¹⁶ Rolf Birk: *Münchener Handbuch Arbeitsrecht*, Munich, C.H. Beck, 2000, Vol. I, para. 17, marginal note 52.

Universality and flexibility

Ideally, the standards set in International Labour Office instruments are of universal significance and not just because they are formally directed at all States. Given the diversity of conditions throughout the world, a minimum level of flexibility is a *sine qua non* if standards are to be genuinely universal. Such flexibility can and must be borne in mind when establishing standards, as article 19, paragraph 3, of the ILO Constitution expressly notes. The corollary of the principle of universality and the converse need for flexibility in keeping with that provision is that the implementation of standards must be uniform. “Double standards” are rejected. This is often a burning issue for developing countries. As explained earlier, their governments often agree to the drafting of new Conventions and then ratify them. After a few years, when reports on compliance with standards find fault with legislation and practice in this area, these countries not infrequently plead that developing countries cannot meet such demands and therefore expect special allowances to be made for them.

There are many ways of achieving flexibility in ILO instruments. For example, they should lay down generally accepted principles rather than technical details. Real minimum standards or social policy targets should be defined in supporting documents, if there is a practical need for them, and the means of implementation should largely be left to the discretion of member States. The purpose of such supporting documents is always to pursue a policy serving the specified aims. This will require measures which differ from country to country and usually produce a policy mix. Thought must also be given to temporary arrangements either in respect of the whole instrument or of individual provisions. Greater utilization must be made of the flexibility clauses permitted by article 19, paragraph 3, of the ILO Constitution. These include allowances for “climatic conditions” and the “imperfect development of industrial organization”. The “other special circumstances” should lead to more frequent use of “equivalence” clauses or other specified adjustment mechanisms, exceptions and alternatives.¹⁷

More than ever, ILO instruments must be examined to see if they are consistent with the aims of creating jobs and promoting firms’ ability to compete. Nothing can be allowed to stand in the way of these priority aims. David Morse, the former Director-General of the ILO, realized this when, in his Report to the 53rd Session of the International Labour Conference in 1969 on the occasion of the 50th anniversary of the ILO, he wrote, with reference to the aims and purposes of the World Employment Programme, that the central concern was no longer an improvement in the working and employment conditions of those who

¹⁷ For more details, see Wisskirchen and Hess, *op. cit.*, p. 18.

already had a job, but the fate of those without an adequate source of employment.¹⁸

A realistic indicator of whether a new ILO standard meets these requirements is whether broad consensus is achieved between all three constituents during its drafting. This begins with the choice of subject in the Governing Body, but the subsequent preliminary work done by the Office is all-important. It includes drawing up a list of issues based on a report on law and practice and a careful, unbiased analysis of member States' answers. In the decisive debate of the technical committee, decisions taken by a very narrow majority (Governments, Employers and Workers each hold one-third of the votes) often lead to texts which, from the point of view of industry, fall far short of the above-mentioned criteria.

It does not seem to be in keeping with the times that a Convention enters into force after garnering only two ratifications¹⁹ and that it may be denounced only after ten years, with one year's notice. After that, every member State remains bound by it for a further ten years. There are no clauses in the ILO Constitution or in the Standing Orders of the Conference stipulating such rules, which have nevertheless been incorporated in the standard final provisions since 1928. The Conference can, and therefore should, in future decide on the content of the final provisions of each new Convention. Greater flexibility in details and greater variability according to the area being regulated would be desirable and appropriate when determining the number of ratifications needed for a Convention to enter into force and what possibilities there are for denouncing it.

Germany, for example, has ratified 83 out of a total of 185 Conventions.²⁰ Of these, 74 are still in force. In Germany, as in many industrialized States, a decision against ratification is rarely prompted by the fact that the actual standards demanded contain too high a level of protection; it is usually the excessive number of legal and technical details that are inimical to integration in a national legal system. The Maternity Protection Convention (Revised), 1952 (No. 103), is an important exception where the very content, rather than the fine legal details, prevents ratification. Article 4, paragraph 8, lays down that in no case shall the employer be individually liable for the cost of benefits due to women employed by him. The contribution which the employer must

¹⁸ ILO: *The World Employment Programme*, Report of the Director-General, International Labour Conference, 53rd Session; see also David Morse: "The World Employment Programme", in *International Labour Review* (Geneva), Vol. 97 (1968), No. 6, pp. 517-524.

¹⁹ By way of comparison, the Statute of the International Criminal Court enters into force only when it has been ratified by 60 States. The Framework Convention on Tobacco Control of the World Health Organization needed 40 ratifications to come into force.

²⁰ To date the United States of America have ratified 14 Conventions, France 124 and Japan 47.

make towards the maternity benefit under Article 14 of the Maternity Protection Act and which, in many cases, constitutes the major part of the benefit paid in lieu of a wage, is therefore incompatible with the Convention, which has not been ratified by Germany.

Many existing ILO standards are obsolete. This is not surprising if one thinks of instruments from the Organization's early days, when industry and the world of work looked quite different from their modern counterparts. However, it is clear that much more recent standards are definitely flawed. One telltale indicator is the sharp drop in the rate of ratifications of Conventions over the past few decades. Of the 22 agreements adopted between 1980 and 1995, only eight have obtained more than ten ratifications, while 12 Conventions received fewer than ten.²¹ Hence the Report of the Director-General to the 87th Session of the International Labour Conference in 1999 states: "ILO Conventions and Recommendations are a vital source of protection for working people all over the world. However, except for a handful of Conventions, most ILO standards are not well known. Ratification is also a growing problem because of treaty congestion. Of the 23 Conventions and two Protocols adopted in the 15 years from 1983 to 1998, only three have received at least 20 ratifications. Even when ratified, most Conventions are only weakly implemented" (p. 17).

A glance at the reports of the Committee of Experts on the Application of Conventions and Recommendations (Committee of Experts) would seem to bear out the Director-General's feeling that ratified Conventions are being poorly enforced.²² Its mostly unfavourable comments have grown substantially over the years. In fact, the Committee's annual report lengthened steadily from 316 pages in 1983, to 460 pages in 1995, and to 786 pages in 2003.²³ Even allowing for the rising number of ratifications, criticism of shortcomings in the implementation of ratified agreements has increased. And it should not be forgotten that, in recent years, the trend has been towards shorter comments on each individual case.

Criticism and new approaches

Since the end of the East-West conflict, the Employers' representatives in many of the Organization's committees have more consistently and with mounting fervour highlighted defects in the web of ILO standards. They have strongly advised against the continued production of international standards with the same contents and procedural

²¹ For more details, see Christian Hess in *Arbeitgeber* (Berlin), 1995, No. 11, pp. 414 et seq.

²² See in detail below under the section on the Committee of Experts.

²³ In both cases, these figures refer to the English text; the French and Spanish versions are always considerably longer. The report for 2004 is not quoted because it started to appear in a different format and so no straight comparison is possible.

methods as those of the past. In their opinion, the flagging acceptance of the resulting texts shows that the ILO is in danger of becoming irrelevant to industrial and labour practices and thus of forfeiting much, if not all, of its reputation and credibility.

Practical suggestions as to the way forward for the ILO include focusing on essentials when setting standards. This means, for example, that it is not necessary to regulate each and every possible detail. On the contrary, a careful examination should be made of the best way to tackle a problem and, above all, of how many existing provisions might offer a solution. If an instrument taking the form of a Convention is considered, it should comply with these principles.²⁴ As well as examining content, thought should especially be given to whether a binding instrument like a traditional Convention is really needed. Employers are of the opinion that, in the future, the ILO must make much greater use of the many and various possibilities it has so far neglected. These include stand-alone Recommendations, i.e. Recommendations that do not supplement a Convention, codes of practice or of conduct, handbooks, technical guidelines, resolutions and conclusions following detailed consultations, as well as conference decisions in the guise of declarations on topics of central importance, which map out follow-up action.²⁵

It is revealing that, in his annual reports to the International Labour Conference, the Director-General has taken up the subject of a changing world and of the ways the ILO must react to it. He has accompanied his increasingly censorious analyses with suggestions for improvements to existing standards and possible lines of action in the future. This is especially true of his Reports in 1997 and 1999, on the ILO's standard setting and globalization, and on decent work, respectively.

A tripartite Working Group on Policy regarding the Revision of Standards was set up in 1995 in response to this debate. It was intended to determine whether, and to what extent, standards laid down before 1985 were still relevant. The findings of the Working Group, which were approved by the Governing Body, and its proposals, some of which have already been implemented by the International Labour Conference, are remarkable, but not surprising to insiders. Of the 184 Conventions referred to in the findings, only 71 were classified as "up-to-date". But in fact only 159 Conventions were studied, because the other 25 Conventions adopted after 1985 were deemed, without further ado, to be "up-to-date" in the decision establishing the working group. In fact, these norms, which were all arbitrarily classified as meeting today's demands, are often of

²⁴ See in detail above, under the section on universality and flexibility.

²⁵ For more details, see the position paper of the International Organisation of Employers of June 2000, reproduced in Appendix 8 in Wisskirchen and Hess, *op. cit.*, pp. 121 et seq.

dubious practical value, as is proved by the fact that, with a few exceptions, the rate of ratification of Conventions adopted over the past 20 years is catastrophically low, as pointed out earlier. The Working Group took the view that 24 Conventions should be revised and that 54 were “outdated”. The findings with regard to Recommendations were similar, save that they referred to 67 obsolete texts. The Working Group requested further information before definitively classifying a number of instruments. Very few escaped a verdict for lack of consensus. A total of 24 Conventions have already been shelved; in other words, there will be no further calls for their ratification and no detailed reports on compliance with them will be requested.

The Governing Body has suggested that the Conference should withdraw 11 Conventions which have never entered into force. Five Conventions were withdrawn by the 88th Session of the International Labour Conference in 2000. The same action was taken on 20 Recommendations by the 90th Session in 2002 and on a further 16 Recommendations by the 92nd Session in 2004.²⁶

Amendment of the ILO Constitution

Withdrawal is a preliminary or intermediate step preceding the final abrogation of a Convention. Abrogation of a Convention which has been adopted and which has entered into force is not (yet) possible under the ILO Constitution. In this, ILO standards differ from national statutes or the supranational provisions of the European Union. The underlying reason is not that these standards are seen as eternal truths admitting of no revision – although in the final analysis this is the view that is probably sometimes taken – but that there is an international dispute as to the legal nature of ILO standards when they take the form of Conventions.

One view is that the adoption of a Convention amounts to an international law-making act. Support for this view may be adduced from the fact that delegates to the International Labour Conference may vote individually and can shape the content of the proposed drafts. In particular, they may decide whether they are to take the form of a Convention, a Recommendation or another instrument (article 4, paragraph 1, and article 19, paragraph 1, of the ILO Constitution). Thus the full International Labour Conference decides like a parliament on the acceptance or rejection of an agreement. Obligations arise for member States as soon as a Convention is adopted by the Conference with the requisite two-thirds majority, i.e. before ratification by member States. Every Convention that has been adopted must be submitted to the competent authority in

²⁶ All these figures and further details may be found in the document considered by the Governing Body at its 283rd Session in March 2002 (GB283/LILS/WP/PRS1/2).

member States (this is usually parliament) within 12 or 18 months at the latest (article 19, paragraph 5(b), of the ILO Constitution). The ILO must be informed of this submission and of the competent authority's decision (article 19, paragraph 5(c), of the ILO Constitution). At intervals set by the Governing Body, member States must submit a report on the position of their law and practice in regard to the matters dealt with in the Convention which has not been ratified (article 19, paragraph 5(e), of the ILO Constitution). These reports form the basis for the annual General Survey of a topic which is normally related to one or, in some cases, two Conventions and the Recommendations pertaining to them.

On the other hand, ILO Conventions display all the essential characteristics of international treaties between States. The very name "Convention" is indicative of agreement *qua* a characteristic of a treaty. Above all, the above-mentioned standard final provisions embodied in all Conventions make it plain that they are international treaties. Accordingly the obligations flowing from the contents of a Convention are applicable to a State only when it has committed itself to their assumption by ratification, not as from the time the agreement is adopted by the "legislator", i.e. the full International Labour Conference, or when the agreement enters into force 12 months after two member States have notified their ratification of the instrument. Nor does a new version of an agreement lead to the replacement of the old one, as is customary in the case of statutes; ratification merely entails the automatic denunciation of the old agreement. The old agreement cannot, however, be ratified after the entry into force of a new one.

These few comments show that ILO Conventions possess both elements: on the one hand, they are like laws because of the way they come into being and the obligations they place on member States vis-à-vis the ILO and, on the other, they display the typical elements of an international treaty in that they impose substantive obligations on the ILO and other contracting States,²⁷ which become effective only after the voluntary ratification of an agreement.²⁸

In the final analysis, I do not believe that it is of decisive importance whether one concludes from the foregoing that ILO Conventions must be divided into a statutory and a conventional part, or whether one speaks of the dual nature of these agreements. In my opinion, it was not only legally feasible, but also justified from the practical point of view given the large number of completely outdated agreements, that in 1997 the International Labour Conference decided to amend article 19 of the ILO Con-

²⁷ For example, the filing of a complaint against another member State for unsatisfactory observance of a Convention is permissible only when both States have ratified the Convention (article 26, paragraph 1, of the ILO Constitution).

²⁸ For a detailed commentary on the whole question and many examples in support of this view, see Wagner, *op. cit.*, pp. 27-36.

stitution so as to create the possibility of having agreements abrogated by the full Conference, either by consensus or with a two-thirds majority. Before any such decision is taken, a number of careful feelers are put out to ascertain the general opinion. Lastly, the Governing Body, acting by consensus or a four-fifths majority, must place the intended abrogation of a Convention on the Conference's agenda (article 11 of the Standing Orders of the Conference). The Workers' group which, from experience, is cautious about the abrogation of International Labour Office standards can therefore always block any such move in the Governing Body.

These amendments of the Constitution and Standing Orders were adopted, with the requisite majorities, by the 85th Session of the International Labour Conference in 1997. Nevertheless amendments of the Constitution enter into force only when they have been ratified by two-thirds of the Members, five of which must come from the ten States of chief industrial importance (article 36 of the ILO Constitution). By the end of 2004, only 80 of the necessary 118 ratifications had been received. Some member States have not ratified the amendments so far, because they hold the above-mentioned opinion that, legally speaking, the ILO cannot interfere with international obligations arising from the ratification of ILO agreements. However, this position did not prevent governments, whose representatives had defended this opinion in the Committee on the Application of Conventions and Recommendations (Conference Committee), from voting in favour of the amendments to the Constitution in plenary at the 85th Session of the International Labour Conference. Only the International Court of Justice (ICJ) can definitively clarify this question of the interpretation of the ILO Constitution (article 37, paragraph 1, of the ILO Constitution).

First attempts to find a new direction

In recent years, the ILO has made various attempts to meet contemporary challenges more effectively. This not only entails looking back at old international labour standards and getting ready to clear out some which are outdated. As already mentioned, obsolete instruments are being shelved or withdrawn and, once the relevant amendment of the Constitution has entered into force, they will certainly be abrogated. The manner in which new standards are framed has altered considerably as well. This is true, above all, of the number of new instruments. Whereas earlier, two new agreements were adopted almost every year, the rate has halved since the beginning of the 1990s. The year 1996 was an exception, as the three Conventions on seafarers were adopted. However, seafaring is, on the whole, in a special position, in that issues connected with it are discussed in special conferences, where it has been decided that the 60-plus agreements on seafaring should be amalgamated into a single instrument.

The changes concern procedure and content, too, not just the number of instruments adopted. Several trends are discernible. One positive example, as far as the content of new instruments is concerned, is the Worst Forms of Child Labour Convention, 1999 (No. 182). This deals with something that is a matter of great urgency in many parts of the world and was adopted unanimously by the Conference. The Convention entered into force on 19 November 2000 and by 31 December 2002 it had already been ratified by 132 member States (150 by the end of 2004). No agreement has ever received so many ratifications in such a short time.²⁹ It was preceded several years earlier by the launching of the International Programme on the Elimination of Child Labour (IPEC), which is strongly supported by Germany. The aim of this programme is to create conditions such that children can receive schooling and vocational training instead of engaging in hard physical labour and an essential element is providing help for families hitherto dependent on their children's work for income.

Another aspect comes under the heading of more development aid. The International Training Centre in Turin has long proved its worth. Training assistance is also offered locally, i.e. in individual member States. Much of it takes the form of seminars and workshops to explain ILO standards and to suggest possible ways of implementing and applying them in practice. The multidisciplinary advisory teams which are assigned or attached to the ILO's regional offices are on hand to provide member States with other support measures. They and other forms of technical assistance and cooperation in its widest sense have all been stepped up in recent decades and, more recently, they have been directed at achieving the four strategic objectives of the ILO.³⁰

Instead of formulating traditional standards, in recent years the International Labour Conference has broached some questions in general discussions where a new, integrated approach plays a role. Put simply, this approach means that a subject should not be seen in isolation as a legal matter, and this new method should improve the coherence, relevance and impact of standards and related activities. To this end, an in-depth analysis is initially made of existing regulations, support measures and technical assistance so that, in a second phase, after discussion in the Conference an action plan can be worked out by the Governing Body in which the possible establishment of a standard or the adoption of other measures is proposed. These measures may be the revision or consolidation of existing rules, the dissemination of information, awareness raising, the strengthening of technical cooperation or the suggestion that careful

²⁹ *Lists of Ratifications by Convention and by Country*, International Labour Conference (ILC), 91st Session, 2003, pp. 212-213.

³⁰ See ILO: *Decent work*, Report of the Director-General, ILC, 87th Session, 1999, Geneva, 1999, pp. 55 et seq.; and Wisskirchen and Hess, op. cit., pp. 53 et seq.

new research should be carried out.³¹ Hence industrial health and safety were extensively debated at the 91st Session of the International Labour Conference in 2003, as was migration at the 92nd Session in 2004. At this early stage, it is impossible to predict the overall impact and significance of this new integrated approach with any certainty. But it seems to be heading in the right direction.

The ILO Declaration on Fundamental Principles and Rights at Work and the Follow-up to this Declaration, which were adopted without opposing votes at the 86th Session of the International Labour Conference in 1998, are particularly important when seen against the background of this new perception of the type of action to be taken. Basically, this Declaration obliges all member States to respect, promote and realize the following principles:

- freedom of association and the effective recognition of the right to collective bargaining;
- the elimination of all forms of forced or compulsory labour;
- the effective abolition of child labour; and
- the elimination of discrimination in respect of employment and occupation.

The Declaration is not an agreement which can be ratified. It sets forth principles; it does not lay down specific, detailed rules. Essentially the principles in question are anchored in the relevant Conventions, the preamble to the ILO Constitution and the Declaration of Philadelphia. The special follow-up measures to this Declaration emphasize the purely promotional value of this instrument and are not identical with the previous monitoring system for ratified Conventions. Nevertheless, the report which must be drawn up every year on progress towards the realization of the principles set out in the Declaration and the Global Report which each year covers one of the four categories of fundamental principles in turn are based on the corresponding national reports. Thus, freedom of association and the effective recognition of the right to collective bargaining were the focus of attention at the 92nd Session of the International Labour Conference in 2004. The report was discussed intensively by the Conference.³²

At the 91st Session of the International Labour Conference in 2003 there was a general discussion of the employment relationship. This constituted a resumption of the attempt (broken off in 1998) to achieve agreement on the subject of “contract labour”. The attempt had foundered because of an imprecise, extremely broad definition of the legal relations to be covered, including disguised employment, triangular employment relationships, fictitious self-employment and various other forms of

³¹ Wisskirchen and Hess, *op. cit.*, p. 59.

³² ILC, 92nd Session, 2004, *Record of Proceedings*, Vol. I, pp. 14/1-14/42.

self-employment, such as contracts for the performance of work or provision of services, all of which were to have been covered by labour rules and regulations. The debate at the International Labour Conference in 2003 narrowed down points of disagreement, but the conclusions remained controversial and unclear in many areas. The subject is to be taken up again in 2006 at the 95th Session of the International Labour Conference.

In the opinion of the Director-General, one of the instruments with a future is the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy.³³ It has already been revised and is generally considered to have proved its worth.

The buzz term “corporate social responsibility” refers to a fairly recent subject, but so far no consensus has been reached on the forum where questions in this connection could best be discussed and handled. The European Union, European standards institutes and the ILO have all been suggested.

Initial evaluation

The above-mentioned trends over recent years show that the ILO – i.e. its Members – is on the point of leaving well-trodden paths and setting out to explore new ones in an endeavour to discover employers’ and workers’ present and future needs in a globalized world. An appropriate reaction is needed, and the best means of action selected to meet those needs. In addition to Conventions in the narrow, traditional sense, greater use will have to be made of many of the other measures and possible types of action open to the ILO. As far as content is concerned, it is vital in a fast-changing world to identify basic principles and to formulate really indispensable minimum standards, while leaving enterprises and employees the necessary room for manoeuvre.

The realization that there is a trend towards greater mobility, as outlined above, did not drop like a bolt from the blue, but is based on a sober analysis of the widening discrepancy between the ILO’s activities and the effects thereof, as demonstrated, for example, by the number of Conventions adopted, on the one hand, and the rapidly declining willingness to ratify and enforce these standards, on the other. With respect to procedure, such a new departure calls for many informal and official consultations among all concerned, i.e. between all three constituents – governments, employers and workers. Much progress has already been made, but the process is not yet complete. It might well become a permanent process. In all this, the weight and influence of a major authority like the International Labour Office should not be underestimated.

³³ ILO: *Reducing the decent work deficit: A global challenge*, Report of the Director-General, ILC, 89th Session, 2001, Geneva, 2001, p. 41.

Despite the fact that a certain basic consensus has been reached on many vital changes, workers are complaining with alarm and growing frequency about the ILO producing “soft law” with no binding force. Employers must also think hard about the ILO’s new tack, for it could be linked to an insidious widening of the ILO’s competence, along the lines of the “open method of coordination” at European level. This is particularly true when new rules are not primarily directed at member States, as has hitherto been the case, but directly demand certain kinds of conduct by companies. Such shifts would inevitably have an impact on the ILO monitoring system.

Standards monitoring

Introduction

The ILO’s system for monitoring standards is regarded as the best, because it is the most effective, compared with the systems employed by various other United Nations agencies. This statement is, of course, relative. The relative nature of the power to implement a provision is a characteristic of international law.³⁴ Unlike individual States and unlike the United Nations in certain areas related to war and peace, the ILO has no real enforcement measures at its disposal.

Article 33 of the ILO Constitution offers the most far-reaching option. According to this article, the Conference may decide on unspecified “action” to secure compliance with the recommendations of a Commission of Inquiry or a decision of the ICJ as may seem “wise and expedient”. A decision of this kind was taken for the first time by the 88th Session of the International Labour Conference in 2000. It was directed against Myanmar (formerly Burma) because, despite the comprehensive recommendations contained in a report of a Commission of Inquiry dating from 1998, the Government had not honoured its obligation to abolish the widespread, systematic use of forced labour which had existed in the country for many years. According to the terms of the resolution adopted under article 33 of the ILO Constitution, ILO support for the country is to cease and it is suggested *inter alia* that member States should review their economic relations with Myanmar. In the resolution, the Conference instructs the Committee on the Application of Standards to examine in a special annual meeting whether and to what extent Myanmar is meeting its obligations.³⁵ Over the past four

³⁴ Birk (1991), p. 361; Birk (2000), Vol. I, para. 17, marginal note 63; N. Valticos: “The future prospects for international labour standards”, in *International Labour Review* (Geneva), Vol. 118 (1979), No. 6, p. 693.

³⁵ See Brupbacher, *op. cit.*, pp. 60 et seq. for further developments in this case.

years, various contacts and agreements between the ILO and the Government of Myanmar have led to a few changes pointing in the right direction; but, in practice, a breakthrough, in the sense of the abolition of forced labour, is still a long way off.³⁶

The effectiveness of the Organization's monitoring system rests, on the whole, on various measures, some of which have a cumulative impact. The starting point is, as stipulated in Article 408 of the Peace Treaty of Versailles, member States' annual reports on measures to implement the Conventions they have ratified. The most important and, in some cases, expanded reporting obligations stem from articles 19, 22 and 35 of the ILO Constitution. After reforms in 1959, 1976, 1993 and 2000, reports on ratified Conventions in keeping with article 22 of the ILO Constitution, which used to be submitted every year, are now presented at intervals of two years for fundamental and "priority" Conventions and five years for all the others.³⁷

Whether the consideration of these governments' reports leads to comments being made in the reports of the Committee of Experts depends on the experts' assessments. Petitions from employers' and workers' organizations often provide not only the basis for the contents of evaluations, but also the impetus to look into a matter. The causes and motives for such petitions vary. They are often found to arise from attempts to raise conflicts internal to the State on to the international stage in order to put pressure on a given government.

The findings of the Committee of Experts, the Conference Committee³⁸ and the full Conference are set out in independent written reports which may be consulted by anyone. It is primarily the repeated, public scrutiny of a member State's observance of ILO standards which therefore exerts political and moral pressure on the government in question. The amount of pressure depends on the different levels of awareness of the ILO and its presence in the socio-political life of the relevant country.

In addition to the regular, multi-stage monitoring briefly outlined here, there are also special supervisory procedures. These include representations made by employers' and workers' associations that a member State has failed to secure effective observance of a Convention (article 24 of the ILO Constitution). There has been a sharp rise in the number of these representations over the years, but all too often one cannot help feeling that such procedures are used to air internal political disputes on the international stage. In this respect, Birk, quoting specific examples with reference to Germany, expresses the opinion

³⁶ ILC, 92nd Session, 2004, *Record of Proceedings*, Vol. II, pp. 24 Part 3/1-24 and Part 3/65; and ILC, 93rd Session, 2005, *Provisional Record No. 22*, Part 3.

³⁷ Wisskirchen and Hess, *op. cit.*, pp. 25 et seq.

³⁸ See below, under the section on the Conference Committee.

that “The real purpose of asserting that national substantive law does not comply with ILO standards is simply to heighten trade union pressure on the national legislator indirectly via the ILO.”³⁹

A complaint can also be filed against a member State. However, this can be done only by a member State which has itself ratified the Convention, by a delegate to the Conference or by the Governing Body acting of its own motion. If the complaint is deemed admissible, a Commission of Inquiry is appointed (article 26 of the ILO Constitution). This essentially cumbersome complaints procedure was not used at all in the first 40 years of the ILO’s existence and only moderate use has been made of it since then. Its most recent use has been in the case of Belarus.⁴⁰

When the problems concern freedom of association, they can be referred to the body especially set up to deal with this issue, the Committee on Freedom of Association.⁴¹

The Committee of Experts

Establishment and terms of reference

The establishment of the Committee of Experts on the Application of Conventions and Recommendations was a reaction by the ILO to the rapidly rising flood of information in the first years after its founding, in response to the reporting obligation placed on member States in Article 408 of the Peace Treaty of Versailles. At the suggestion of the Conference Committee established under article 408, the 8th Session of the International Labour Conference resolved in 1926 to set up the Committee of Experts, initially on a trial basis.

As far as the terms of reference of the new body were concerned, the debate and resolution made it very clear that its tasks were purely technical and not judicial.⁴² The Committee of Experts is to advise the Conference and its Committee “as to the facts” and it is up to the Conference to “decide upon its attitude and upon what appropriate action it might take or indicate”.⁴³ Further on, it is stated that “the Committee of Experts would have no judicial capacity nor would it be competent

³⁹ Birk (1991), p. 363.

⁴⁰ See ILO: *Report of the Commission of Inquiry established to examine the complaint concerning the observance by the Republic of Belarus of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), made by delegates to the 91st Session (2003) of the International Labour Conference under article 26 of the Constitution of the ILO* (Geneva, 2004).

⁴¹ See below pp. 283 et seq., regarding the interpretation of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87).

⁴² ILC, 8th Session, 1926, First Record, Appendix V, p. 395.

⁴³ *ibid.*, p. 398.

to give interpretations of the provisions of the Conventions nor to decide in favour of one interpretation rather than another".⁴⁴

Its mandate, which was last reformulated by the Governing Body in 1947,⁴⁵ is to be found in the first paragraphs of each of its reports.⁴⁶ It states that the Committee must examine member States' reports on the Conventions they have ratified under article 22 of the ILO Constitution and the information and reports furnished by member States under articles 19 and 35 of the ILO Constitution.

Some rules for the working methods of the Committee of Experts are still laid down today by the Governing Body in accordance with the Conference's original decision to appoint a committee. The Committee has no written rules of procedure or standing orders. As the Governing Body has explicitly noted, the original mandate remains unchanged.⁴⁷ The Governing Body has, from the outset, ensured that the terms of reference laid down by the Conference are adhered to. For example, in the second Committee of Experts report submitted in 1928, it altered the French heading "critiques" ("criticism") to "observations" ("observations")⁴⁸ and this is the term still used today. The Committee of Experts itself has repeatedly drawn attention to the fact that its mandate is unchanged and it firmly emphasized this in its comments on its fiftieth anniversary.⁴⁹

Since then, the Committee of Experts has, however, tried to widen its competence within the monitoring system at the expense of other bodies. This is true, above all, of the Conference Committee, where the Employers' group sometimes openly criticize the experts' findings. If Government representatives take issue with the experts' comments in the Conference Committee, they do so in diplomatic language. The Workers' delegates basically always praise the experts' observations without exception and usually declare them to be virtually sacrosanct. But this does not stop them in some instances from strongly voicing a different position without troubling themselves further with the discrepancy between their view and that of the experts. This happens, for example, when the experts examine an individual case and do not regard the law and practice of a given country as being a serious violation of a Convention,

⁴⁴ *ibid.*, p. 405.

⁴⁵ The new wording was solely a reaction to amendments to the Constitution in 1946 which imposed new duties on member States with regard to reporting and the provision of information. These reports were included among those which had to be examined by the Committee of Experts.

⁴⁶ *Report of the Committee of Experts on the Application of Conventions and Recommendations. General report and observations concerning particular countries*, Report III (Part IA), ILC, 91st Session, 2003, para. 4 (hereinafter reports of the Committee of Experts will be referred to by the ILC to which they were submitted).

⁴⁷ See Minutes of the 103rd Session of the Governing Body, 12-15 Dec. 1947, p. 172, "... [the Committee of Experts] which prepares the ground for the work of the Conference Committee".

⁴⁸ Wagner, *op. cit.*, p. 65.

⁴⁹ ILC, 63rd Session, 1977, Report III (Part 4A), para. 29.

whereas the Workers' side maintain that a serious breach of a Convention has occurred.

In 1990, the question was raised of the binding nature of the Committee of Experts' findings. In view of the unambiguous provisions of article 37, paragraph 1, of the ILO Constitution, it is virtually indisputable that only the ICJ may give a binding interpretation of the ILO Constitution and ILO Conventions.⁵⁰ Hence the experts' findings and interpretations are not binding.⁵¹ Surprisingly, in its 1990 report, the Committee did however suggest that its interpretations are binding so long as the ICJ remains silent.⁵² This thesis provoked a fierce and critical debate at the International Labour Conference in June 1990. In their report the following year, the experts noticeably corrected their statement and came to the conclusion, to which they still cleave today, that the views of the Committee of Experts cannot be regarded as a binding decision, that their evaluations have no *erga omnes* effects⁵³ and that it is not incompatible with the Committee's position when the Employer members of the Conference Committee reserve the right to depart from its views.⁵⁴ Even in the reasoning of the Committee of Experts, the whole Conference Committee must be entitled to express a dissenting opinion.⁵⁵

More recently there have been fresh moves which could be interpreted as an attempt by the Committee of Experts to widen its mandate, at least de facto. In the General Survey submitted to the 91st Session of the International Labour Conference in 2003, on the Protection of Wages Convention, 1949 (No. 95), which was based on member States' reports under article 19, paragraph 5(e), and article 22 of the ILO Constitution, the Committee classifies this Convention as a fundamental agreement.⁵⁶

The classification of a Convention as a fundamental, priority or other agreement has a bearing on the frequency with which member States must report. The issue often gives rise to controversy in the Governing Body of the ILO, which is competent to decide the matter. To

⁵⁰ Apart from one case in 1932, no use has ever been made of the complicated, lengthy and expensive proceedings before the ICJ. See also Brupbacher, op. cit., p. 95.

⁵¹ Birk (2000), marginal note 63; R. Birk, H. Konzen, M. Löwisch, T. Raiser, H. Seiter: *Gesetz zur Regelung kollektiver Arbeitskonflikte*, Tübingen, 1988, pp. 28 et seq.; Markus Heintzen: "Die Neuregelung des §116 AFG und das internationale Recht", in *Der Betrieb*, DB, 1987, p. 483; M. Löwisch, V. Rieble: *Arbeitsrecht (AR)-Blattei*, Vol. 17, *Schlichtung und Arbeitskampf*, p. 62; M. Martinek: "Verfassung und Arbeitsweise der IAO in Bewegung", in *Festschrift für Gerhard Schnoor*, 1988, p. 156.

⁵² ILC, 77th Session, 1990, Report III (Part 1A), para. 7.

⁵³ i.e. an obligation binding on *everyone*.

⁵⁴ ILC, 78th Session, 1991, Report III (Part 1A), paras. 11-13.

⁵⁵ For the relationship between the Conference Committee and the Committee of Experts, see below under the section on the Conference Committee.

⁵⁶ ILC, 91st Session, 2003, Report III (Part 1B), para. 511.

date, the Governing Body has not classed Convention No. 95 as a fundamental or priority agreement.

The Committee of Experts likewise overstepped its mandate when, in the same General Survey, it urged member States which had not ratified the Protection of Wages Convention, 1949 (No. 95), to consider doing so in the immediate future.⁵⁷ Such recommendations regarding ratification are controversial subjects in a political organ like the Governing Body. In this specific case, the Governing Body had not made any such sweeping recommendation to ratify Convention No. 95.

From time to time, the Committee of Experts, like any other body, reviews its working methods. After announcing such a review two years earlier, the Committee, in its report to the 91st Session of the International Labour Conference in 2003, mentions that it had “agreed on a number of significant changes relating to its working methods”.⁵⁸ The changes are not described, only their aims. In the same report, the experts express their interest in “participating in field missions” with the declared aim of “promoting the visibility and influence of the Committee”.⁵⁹ It is questionable whether the experts’ participation in the operative business of the International Labour Office, in the form of missions, is entirely compatible with the independence, impartiality and objectivity which it has always stressed. Moreover the Committee might arguably have enough influence on account of its institutional position and its ensuing main duties.

Similar doubts arise in view of the fact that, in their General Report, the experts not only discuss, but also evaluate a large number of the activities of the International Labour Office and its various bodies, as well as cooperation with other international or regional organizations. Much of this information, which regularly makes up the bulk of this General Report, is most interesting as a message from the Office of the Director-General, but it has little to do with the Committee’s duties, which are to examine member States’ reports in order to ascertain whether and to what extent they have taken steps to carry out ratified Conventions. It is more likely to encourage a jumbling of the Committee’s terms of reference and therefore to imperil its independence. In these circumstances a new development which began in 2004 is to be welcomed, for the report the Committee of Experts submitted to the 92nd Session of the International Labour Conference clearly signals the first big step away from the undesirable trend described above. The report dispenses with the appraisals of various aspects of standard-setting policy, ratifications and denunciations, which have been customarily included for several decades. Such information is now to be found

⁵⁷ *ibid.*

⁵⁸ ILC, 91st Session, 2003, Report III (Part 1 A), para. 8.

⁵⁹ See footnote 56.

in a new booklet produced by the International Labour Office. That would also be the right place for comments on the ILO's cooperation with other international or regional organizations. For example, the Committee of Experts participates in the examinations of European regulatory systems. But this has nothing to do with the terms of reference given to it in 1926 by the International Labour Conference, which are to consider the reports of ILO Members on the observance of ILO standards; but rather the Committee is acting on behalf of these European institutions, on the basis of an administrative agreement between the ILO and these bodies. Data on that subject have no place in the Committee's report. Such presentations are as inappropriate there as the general comments on the general interpretation of standards, which appear under the heading "Highlights and major trends in the application of international labour standards in certain areas", and which do not amount to a general study in pursuance of article 19, paragraph 5(e), of the ILO Constitution. Lastly, the common title of the two booklets, *Application of International Labour Standards 2004* (I) and (II), is infelicitous, as is the symbol of scales, which appears on both of them, since it suggests that they have been issued by a judicial body.

Working and interpretative methods

The Committee of Experts and the Conference Committee must examine the measures taken by member States to carry out ratified Conventions. To this end, it is necessary to ascertain what the subject matter of the Convention is and how it is subsumed in its provisions. In some cases, it might also be necessary to interpret certain provisions.⁶⁰

At the beginning of their annual reports, the experts have long been wont to emphasize that they are guided by the principles of objectivity, impartiality and independence.⁶¹ But undoubtedly there have been times when a few committee members were not as independent as they should have been, because of the general political climate or, to be more precise, the East-West conflict, which found expression in more or less regular "dissenting opinions" regarding the basic principles underpinning some particularly important Conventions, especially the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), and the Forced Labour Conventions, 1930 and 1957 (Nos. 29 and 105). The Committee of Experts was possibly somewhat traumatized by that period and perhaps these experiences explain the sentence which has been repeated almost dogmatically in its reports for many years: "Decisions on comments are

⁶⁰ Wagner, *op. cit.*, pp. 204-205.

⁶¹ For example, ILC, 91st Session, 2003, Report III (Part 1 A), para. 8.

adopted by consensus”.⁶² Permanent consensus between 20 prominent lawyers is rather unusual, indeed exceptional. Probably the outcome of this consensus stems from the way the Committee has chosen to organize its work. The Committee follows the principle of each member being responsible for certain subjects. This means that each member of the Committee prepares written “draft findings” with the assistance of the specialist from the Office. These findings, for which the member is alone responsible, are then approved by the whole Committee.⁶³ Normally such a procedure leads, almost automatically, to unanimity on the whole report.

Another factor which must be borne in mind is that, in 2003, the 760-page report of the Committee of Experts was based on over 1,500 individual reports from member States.⁶⁴ It contains substantive comments on nearly 700 individual cases.⁶⁵ Direct requests are sent out in response to a considerable number of vague or incomplete national reports, but they are not published in the Committee’s annual report, otherwise it would be considerably longer. Over 1,200 direct requests were issued in 2003, for example.⁶⁶ Every year, the Committee of Experts can avail itself of a two-week meeting in Geneva to complete its work. Since 1999, the experts have devoted half a day of that meeting to talks with the Employer and Worker spokespersons of the Conference Committee. These figures give some impression of the size and weight of the preparatory workload which has to be dealt with by the International Labour Office. The responsibility for this falls to essentially the same staff who have to play a preparatory role, which should not be underestimated, in other supervisory procedures.

Obviously the Committee of Experts hardly ever expresses an opinion on questions of method.⁶⁷ Since the Conventions are international treaties,⁶⁸ interpretation by reference to article 31 (General rule of interpretation) and in some circumstances article 32 (Supplementary means of interpretation) of the Vienna Convention on the Law of Treaties, of 23 May 1969,⁶⁹ is applicable. According to the general rule of interpretation set forth in article 31, the terms of the treaty are of primary importance, as is any agreement in connection with the

⁶² *ibid.*, para. 102.

⁶³ ILC, 73rd Session, 1987, Report III (Part 1 A), para. 43.

⁶⁴ ILC, 91st Session, 2003, Report III (Part 1 A), Appendix II, p. 743.

⁶⁵ ILC, 91st Session, 2003, *Record of Proceedings*, Vol. II, p. 24/2, para. 8.

⁶⁶ *ibid.*

⁶⁷ One exception is to be found in the Report of the Committee of Experts to the 78th Session of the International Labour Conference in 1991. Paragraph 13 states “The Committee none the less bears in mind constantly all the different methods of interpreting treaties” (ILC, 91st Session, 1991, Report III (Part 1 A)).

⁶⁸ See above under the section on amendment of the ILO Constitution.

⁶⁹ United Nations, *Treaty Series*, Vol. 1155, p. 331.

conclusion of the treaty, together with any subsequent agreement or practice in the application of the treaty which establish the agreement of the parties regarding its interpretation. In pursuance of article 32, recourse may be had to the preparatory work of the treaty and the circumstances of its conclusion in order to confirm the meaning resulting from the application of article 31. Basically there is no disputing that ILO Conventions must be interpreted by reference to the Vienna Convention on the Law of Treaties.⁷⁰ The ban on retroactivity embodied in Article 4 of the Vienna Convention does not prevent the application of that same Convention, for that ban explicitly excludes rules to which treaties would be subject under international law. These rules include the above-mentioned rules and means of interpretation *qua* codified international customary law.⁷¹ Moreover, Article 5 of the Vienna Convention, which establishes precedence in the rules of interpretation of international organizations, does not hinder the application of the rules of interpretation of the Vienna Convention. For the ILO Constitution states only who is competent to give an interpretation (see article 37), but does not contain any rules of interpretation whatsoever. In the meanwhile, some important bodies, including the supreme organ of the ILO, the Conference itself, have come out in favour of the application of the Vienna Convention on the Law of Treaties. The experts twice referred explicitly to the interpretative rules of the Vienna Convention⁷² in their General Survey, under article 19 of the ILO Constitution, concerning the Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147), legally speaking one of the most interesting Conventions. The same conclusion was reached by the Governing Body Committee on Standing Orders and the Application of Conventions and Recommendations.⁷³

Lastly, the International Labour Conference itself, at its 88th Session in 2000 pointed out, on the occasion of the confirmation of the Vienna Convention on the Law of Treaties between States and International Organisations of 1986 which had already been ratified by the United Nations, that the above-mentioned Vienna Convention of 1969 was to be applied to the interpretation of ILO Conventions.⁷⁴

⁷⁰ Markus Heintzen and S. Eilers: *Die Völkerrechtskonformität der geplanten Änderung des Neutralitätsparagrafen des AFG*, DB, 1986, 271 (273); Heintzen: *Die Neuregelung des §116 AFG und das internationale Recht*, DB, 1987, 482 (483); Birk (2000), para. 17, marginal note 49 with a limitation which must still be dealt with; Wisskirchen, op. cit., pp. 70 et seq.; Wagner, op. cit., p. 206.

⁷¹ Heintzen and Eilers, op. cit., p. 272, footnote 20; Heintzen, op. cit., p. 483, footnote 16; Ralf Günter Wetzel and Dietrich Rauschnig: *Vienna Convention on the Law of Treaties*, 1978, pp. 253 et seq.; Wolfram Karl: *Vertrag und spätere Praxis im Völkerrecht*, Berlin/Heidelberg, Springer, 1983, pp. 353 et seq.

⁷² ILC, 77th Session, 1990, Report III (Part 4B), para. 54, footnote 7 and para. 244, footnote 13.

⁷³ GB 256/SC/2/2, May 1993, para. 44.

⁷⁴ ILC, 88th Session, 2000, *Record of Proceedings*, Vol. I, pp. 5/2-5/3, paras. 7 and 11.

The Conference Committee

Establishment and terms of reference

The Conference Committee, like the Committee of Experts, was brought into being at the 8th Session of the International Labour Conference in 1926. It is rooted not so much in a Conference resolution as in article 7 of the Standing Orders of the Conference.⁷⁵ The typical characteristics and duties of the Conference Committee are explained by its genesis. This is one of the few standing committees of the International Labour Conference. It is therefore part of the Conference, which is the supreme organ of the ILO. It has a clear, unlimited mandate to consider action and reports. After all, the Conference Committee must report in writing to the plenary. In practice, this report is expressly adopted after discussion in plenary, although the Standing Orders do not specifically call for this.

There is sometimes rather nebulous speculation about the relationship between the two supervisory bodies – the Conference Committee and the Committee of Experts. For example, the Workers in the Conference Committee regularly point out that the two bodies have complementary functions, or complement each other, but it is a moot point what the different duties of the two committees are, or should be. From time to time, the supposedly strictly legal work of the Committee of Experts is contrasted with the allegedly political character of the Conference Committee. Perhaps the aim is to thus give the non-binding observations and evaluations of the Committee of Experts a higher, more authoritative status. In fact, according to their mandate, the content of both committees' work is almost identical. The question of whether a member State is honouring the obligations flowing from the ILO Constitution and the Conventions it has ratified can be answered only in the light of legal criteria. At best, it is possible and sometimes appropriate to take political considerations into account when trying to ascertain why a State does not fulfil, or only imperfectly fulfils, its obligations. Moreover, as already explained, the decisions on the appointment of the two committees clearly show that the findings of the Committee of Experts should in no way prejudice those of the Conference Committee. Nevertheless the two supervisory bodies must be regarded as acting at different stages. The Committee of Experts conducts a kind of preliminary examination. Its observations regularly constitute the starting point, but do not always mark the end, of consultations in the Conference Committee. And, as ex-

⁷⁵ Article 7 states: "Committee on the Application of Conventions and Recommendations. 1. The Conference shall, as soon as possible, appoint a Committee to consider: (a) the measures taken by Members to give effect to the provisions of Conventions to which they are parties and the information furnished by Members concerning the results of inspections; (b) the information and reports concerning Conventions and Recommendations communicated by Members in accordance with article 19 of the Constitution; (c) the measures taken by Members in accordance with article 35 of the Constitution. 2. The Committee shall submit a report to the Conference."

plained, they are not binding on it, otherwise the additional treatment of the same case in the Conference Committee would be a waste of resources. In fact, the Conference Committee frequently receives supplementary information in addition to that forming the basis of the report of the Committee of Experts, which sheds more light on the facts, or which may at any rate alter them. As already noted, the whole report of the Conference Committee and its conclusions as to specific cases are not just discussed by the full International Labour Conference, but expressly adopted by it. Thus the findings of the Conference Committee are approved by the highest legislative body of the ILO.⁷⁶

All in all, as far as the relationship between the Conference Committee and the Committee of Experts is concerned, it is an acknowledged fact that the Conference Committee, as a committee present at every International Labour Conference, is itself part of what is the supreme organ of the ILO. Its statements and findings clearly take precedence over the observations of the preparatory body. If the observations of the Committee of Experts are not expressly adopted by the Conference Committee, they are more of an internal organizational process without external repercussions. They are never binding. Viewed from the outside, however, the situation looks somewhat different: every year the Report of the Committee of Experts is widely distributed in a fine, high-gloss format. The Report of the Conference Committee is printed on grey, recycled paper and tends to get lost among the several thousand pages of less frequently consulted proceedings of the Conference.

Working methods

The many details of the actual working methods of the Conference Committee are not laid down permanently in any rules of procedure. Every year, at the beginning of its meeting, the Committee decides on some general, more technical rules for its work. Much is done according to the principle of “established practice”.⁷⁷ For newcomers to the Committee, procedure is at first somewhat baffling and becomes understandable only when they have taken part several times. The size of the

⁷⁶ Whether and to what extent measures are necessary and sensible in order to consolidate the position of the Conference Committee vis-à-vis the Committee of Experts and the Office must still be examined. To this end, Brupbacher (op. cit., pp. 91 et seq.) suggests that a variety of procedural rules should be amended in order to give the Conference Committee competence for the interpretation of most questions, so that its conclusions would become binding (see in particular *ibid.*, pp. 94 et seq.). However, some of his proposals would limit, and therefore weaken, the terms of reference of the Conference Committee, e.g. the drawing up of a list by the Governing Body and the right of a representative of the Committee of Experts to present a report or petition to the Conference Committee. In any case, such measures would probably not be possible without an amendment of the Standing Orders of the Conference.

⁷⁷ The details are too numerous to be described fully in this paper. For a general overview, see Wisskirchen and Hess, op. cit., pp. 31 et seq.

Committee may also surprise many people: in recent years the number of its full members has ranged from 200 to 250 and there are also a huge number of alternates. This often makes it the largest committee during an International Labour Conference. In recent years, some 100 to 120 governments were represented and there were 80 to 100 Worker representatives and 25 to 35 Employer representatives.

The Committee begins its substantive work with a general discussion touching on standard setting and monitoring and on many of the widely ranging questions which appear in the General Report of the Committee of Experts. It is regularly noted, with great regret, that many governments have not properly carried out their reporting duties. Only 20 to 25 per cent of the reports due are submitted on time – that is, by 1 September every year. About two-thirds are received by the Committee of Experts' meeting at the end of November, but only a small proportion can then be dealt with. About 70 per cent come in by the start of the International Labour Conference on the first Tuesday in June.

The much-lauded supervisory system of the ILO stands and falls with compliance with this basic obligation to report on time. Each of the extensions of reporting intervals in recent decades afforded only temporary relief. The questionnaire which has to be filled out by governments should be simplified and made more precise as the next small step in the series of reforms now under way and which must be continued.

The second part of the general debate in the Conference Committee is devoted to the General Survey which is presented every year by the Committee of Experts and which deals in turn with one or more Conventions on the basis of member States' reports under article 19, paragraph 5(e), of the ILO Constitution. As these surveys also evaluate reports from States which have not ratified the Conventions in question, they explain what is preventing member States from proceeding with ratification. Such a reality test might reveal rules which should be amended or abrogated because they are inconsistent with the requirements of today's world of work, but such an unbiased analysis is rarely contained in these General Surveys. One case in point is the General Survey of 2001⁷⁸ on several Conventions banning night work by women.⁷⁹ The list of denunciations of these Conventions is almost longer than the list of ratifications. Most Member States of the EU, if they ratified Convention No. 89 at all, denounced it in 1991 or 1992 on the basis of a ruling by the European Court of Justice⁸⁰ which found that the ban on night work by women was

⁷⁸ ILC, 89th Session, 2001, Report III (Part 1 B).

⁷⁹ Night Work (Women) Convention, 1919 (No. 4); Night Work (Women) Convention (Revised), 1934 (No. 41); Night Work (Women) Convention (Revised), 1948 (No. 89); and the Protocol of 1990 to the Night Work (Women) Convention (Revised), 1948.

⁸⁰ European Court of Justice (ECJ), 25 July 1991, *Criminal proceedings against Alfred Stoeckel* (C345/89).

incompatible with the 1976 Directive on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.⁸¹ The Night Work Convention, 1990 (No. 171), which was not officially included in the General Survey, has been ratified by a total of nine States. The protocol from the same year, which slightly amended Convention No. 89 from 1948, has received just three ratifications in all.

This unequivocal ruling did not deter the Committee of Experts from trying in its General Survey to woo support for these above-mentioned instruments, which are plainly unacceptable to the vast majority of ILO Members.⁸² This does not exactly betoken a well-developed sense of reality. Moreover it is not the Committee's job to issue such recommendations.

Most of the Conference Committee's work consists in dealing with individual cases. Failures to meet obligations to report and supply information are discussed relatively briefly in the context of "automatic" cases. The Conference Committee's debates centre, however, on the material question of whether and to what extent member States have honoured their obligations from ratified Conventions at domestic level. During the first few days of its consultations, the Conference Committee chooses about 25 cases from the several hundred individual observations in the report of the Committee of Experts, which are broken down according to Convention and member State. It then invites the representatives of the governments in question to respond. Most observations contain criticism of fairly substantial deviations from the requirements of a Convention in the law or practice of a member State.

There is no completely satisfactory procedure for drawing up the list of governments to be invited to respond. A series of generally plausible considerations are normally given as the grounds for the list that is presented. They include, as is customary in international organizations, the principle of equitable geographical distribution. A whole number of different lists could, however, be drawn up on the basis of such general criteria; they are therefore arbitrary. Nor is there any objective, widely recognized benchmark for determining the seriousness of a breach in a completely acceptable manner. Governments which frequently criticize previous practice have not proposed any other convincing alternatives to the Committee. In practice the procedure is that the major international trade union associations – the International Confederation of Free Trade

⁸¹ Directive 76/207/EEC.

⁸² ILC, 89th Session, 2001, Report III (Part 1B), para. 202.

Unions and the World Confederation of Labour – begin months in advance to agree on a proposed list. This proposal is coordinated with the Employers in the Conference Committee at the beginning of the Conference. After both groups have agreed, the list is presented to and approved by the whole Committee. In future, greater attention should be paid to ensuring that the list covers the widest possible range of Conventions which are particularly relevant to industry and the world of work today.

Most of the cases discussed in the Conference Committee concern questions arising from the eight fundamental Conventions, i.e. the freedom of association and the collective bargaining Conventions, the two Conventions on the banning and abolition of forced labour, the two Conventions banning discrimination and promoting equality and the two Conventions prohibiting child labour. The consideration of each case begins with a presentation by the representatives of the member State concerned. States are tending more and more to be represented by the relevant minister or by their ambassador. Then the two group spokespersons make their report. The subsequent general debate sometimes lasts for several hours. The Government representatives and the group spokespersons speak again at the end. Lastly, the Committee Chairperson puts forward a draft conclusion. In difficult cases (and these are not rare), the conclusions are jointly formulated by the Chairperson and Vice-Chairpersons (group spokespersons). Lastly, the Committee decides on the conclusions.

The conclusions contain not only remarks about what the Committee considers to be shortcomings, noticeable deteriorations or improvements compared with earlier examinations of the case but, above all, calls to make the necessary changes in law and practice. It often recommends that the government in question seek general advice or technical assistance from the International Labour Office, or that it avail itself of a direct contact mission. The latter requires the formal consent of the government concerned. In the past, the Committee has, however, expressed the opinion in its conclusions that a given Convention is in need of revision, one example being the Old-Age Insurance (Industry, etc.) Convention, 1933 (No. 35).⁸³

If a country has seriously and repeatedly violated a Convention, the Committee places its conclusions in a special paragraph in its general report to the Conference. It can lend added force to its criticism by noting continued failure on the part of the member State to meet its obligations from a ratified Convention.

⁸³ ILC, 82nd Session, 1995, *Record of Proceedings*, p. 24/68.

*The problems of interpreting instruments,
especially Convention No. 87*

The two main organs for supervising compliance with standards, the Committee of Experts and the Conference Committee, usually arrive at the same or at least very similar conclusions. Occasional differences of opinion must be tolerated, especially as neither body adopts final, binding decisions (article 37, paragraph 1, of the ILO Constitution). The claim made by the Committee of Experts in 1990 that it was entitled to give a binding interpretation until such time as the ICJ had reached a decision was quickly abandoned and in 1991 it endorsed the opinion expressed by the Employers' group in the findings of the Conference Committee.⁸⁴

To date there has been no further reaction from the experts in the old dispute over the interpretation of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), with regard to the right to strike. The experts maintain that the right to strike is based on Article 3 of Convention No. 87, which states that "Workers' and employers' organizations shall have the right ... to organize their administration and activities and to formulate their programmes", taken with Article 10 of the same Convention, which defines "organization" within the meaning of the Convention as any organization "for furthering and defending the interests of workers or of employers".⁸⁵ In addition to these general findings, every year the experts look into numerous individual cases involving specific national provisions governing strikes in some way and thus limiting them to some extent. The Committee of Experts also considers a large number of real situations or actual events which regularly lead to de facto restrictions on strikes in certain circumstances. In approximately 90 to 98 per cent of all these cases the experts conclude that the restrictions on the right to strike, be they de facto or de jure, are not compatible with Convention No. 87. Thus they have formulated a comprehensive corpus of minutely detailed strike law which amounts to a far-reaching, unrestricted freedom to strike.⁸⁶ The occasional, theoretical restrictions are regarded as being hardly ever applicable to the actual situations reviewed. The right to strike cannot, however, be adduced from Convention No. 87, especially if one adheres, even if only loosely, to

⁸⁴ See above under the section on the establishment and terms of reference of the Committee of Experts, especially footnotes 49-54.

⁸⁵ See in detail the most recent comprehensive General Survey dealing with this question, which was submitted to the 81st Session of the International Labour Conference in 1994, Report III (Part 4B), paras. 136-179.

⁸⁶ The most recent General Survey on this subject devotes 44 paragraphs to strikes. By contrast, in their 1959 report, the experts referred to the possibility of a right to strike in only one paragraph (ILC, 43rd Session, 1959, Report III (Part IV), Part Three, para. 68).

the principles of interpretation of international law according to the Vienna Convention on the Law of Treaties, which is authoritative here.⁸⁷

As the experts admit, the wording of Convention No. 87, the preamble of the ILO Constitution and the Declaration of Philadelphia do not refer to strikes. Neither wording, nor any other instrument within the meaning of Article 31, paragraphs 1 and 2, of the Vienna Convention on the Law of Treaties can be said to aim at such an understanding between the parties to Convention No. 87. Similarly, there is no subsequent practice in the application of that Convention which establishes the agreement of the contracting Parties to interpret its provisions as enshrining the right to strike (Article 31, paragraph 3, of the Vienna Convention on the Law of Treaties). For decades, the experts' reports substantiated the argument that there is no such agreement among member States. Nevertheless questions connected with freedom of association do occupy an inordinate amount of the whole report, with strikes figuring prominently among these questions. The actual situations forming the basis of this part of the report clearly show that there is scarcely any other area of labour and social policy where a wider range of rules and practices is in evidence in member States than the law on industrial action.⁸⁸ The ideal type fitting the experts' detailed notions is probably not reflected in any of the rules on industrial action, or in practice. In these circumstances, we cannot assume that a customary right has developed for a particular concept of the right to strike.⁸⁹

Interpretation according to Article 31 of the Vienna Convention on the Law of Treaties therefore leads to the conclusion that strikes are not regulated in Convention No. 87. This conclusion is impressively confirmed if, in keeping with Article 32 of the Vienna Convention, we also look at the preparatory work of the treaty and the circumstances of its conclusion. The experts rightly point out in their most recent General Survey on this topic (mentioned above) that the right to strike was referred to several times in the preparatory work, but no explicit proposal on that subject was put forward during the debates in Conferences.⁹⁰ The experts' comments on the genesis of the Convention are, to put it mildly, incomplete, for the Office's preparatory report on the planned Convention on freedom of association expressly excluded regulation of the right to strike after analysing governments' answers. "Several Governments, while giving their approval to the formula, have

⁸⁷ See above under the section on the working and interpretative methods of the Committee of Experts.

⁸⁸ ILC, 81st Session, 1994, Report III (Part 4B), para. 144.

⁸⁹ This question is left open by Bernd von Maydell in "The concept of political strikes in Germany and in international labour law", in J.R. Bellace and M.G. Rood (eds.): *Labour law at the crossroads: Changing employment relationships. Studies in honour of Benjamin Aaron*, The Hague, Kluwer Law International, 1997, p. 117.

⁹⁰ ILC, 81st Session, 1994, Report III (Part 4B), para. 142.

nevertheless emphasised, justifiably it would appear, that the proposed Convention relates only to the freedom of association and not to the right to strike, a question which will be considered in connection with item VIII (conciliation and arbitration) on the agenda of the Conference. In these circumstances, it has appeared to the Office to be preferable not to include a provision on this point in the proposed Convention concerning freedom of association.”⁹¹ This was again confirmed during debates in the plenary. “The Chairman stated that the Convention was not intended to be a ‘code of regulations’ for the right to organise, but rather a concise statement of certain fundamental principles.”⁹²

When the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), was adopted the following year, this subject was again examined *expressis verbis*. In the course of the subsequent discussions, two Workers’ delegates and one Government delegate vainly tabled proposals to have the right to strike guaranteed in the Convention. Both proposals were rejected. The record of proceedings noted: “The Chairman ruled that this amendment was not receivable, on the ground that the question of the right to strike was not covered by the proposed text, and that its consideration should therefore be deferred until the Conference took up item V of its agenda relating, inter alia, to the question of conciliation and arbitration.”⁹³ As we know, paragraph 4 of the Voluntary Conciliation and Arbitration Recommendation, 1951 (No. 92), refers to strikes and lockouts in neutral language and does not attempt to regulate them.

Lastly, the experts made a very vague allusion to the fact that strikes are mentioned in other international instruments.⁹⁴ In this respect, the Universal Declaration of Human Rights of 1948 is not relevant, although it sets out many fundamental rights in general terms, but they are recommendations and compliance with them is not obligatory.⁹⁵ Article 22, paragraph 1, of the International Covenant on Civil and Political Rights⁹⁶ and Article 8, paragraph 1(d), of the International Covenant on Economic, Social and Cultural Rights⁹⁷ are more apposite. For several years, the texts of the two Covenants formed the subject of negotiations aimed at drafting a single United Nations Human Rights Covenant. A motion to

⁹¹ Report VII, 31st Session of the International Labour Conference, 1948, p. 87.

⁹² ILC, 31st Session, 1948, *Record of Proceedings*, Appendix X, p. 477.

⁹³ ILC, 32nd Session, *Record of Proceedings*, 1949, p. 468.

⁹⁴ ILC, 81st Session, 1994, Report III (Part 4B), para. 143.

⁹⁵ Brupbacher, *op. cit.*, p. 10.

⁹⁶ United Nations: *Human rights: A compilation of international instruments*, Vol. I (First Part), Universal Instruments, Centre for Human Rights, ST/HR/Rev.5 (Vol. I/Part1), Geneva, 1994, p. 28. Article 22, paragraph 1, reads “Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.”

⁹⁷ United Nations, *op. cit.*, p. 11. Article 8, paragraph 1 (d) reads: “The States Parties to the present Covenant undertake to ensure: ... (d) The right to strike, provided that it is exercised in conformity with the laws of the particular country”.

introduce a right to strike alongside freedom of association was rejected. After the text was split into the two above-mentioned Covenants, Article 8 was given the wording quoted in footnote 94. On the whole, these rules have less binding force and the monitoring machinery is weaker than those of ILO Conventions.⁹⁸ The United Nations Human Rights Committee, in its decision of 18 July 1986,⁹⁹ which expressly relied on the interpretation rules of the Vienna Convention on the Law of Treaties, concluded that the right of freedom of association embodied in Article 22 did not necessarily imply the right to strike and the authors of the Covenant did not have the intention of guaranteeing the right to strike. A comparative analysis of Article 8, paragraph 1(d), confirmed that the right to strike could not be regarded as an implicit element of the right to form and join trade unions. The right to strike under Article 8, paragraph 1, was clearly and expressly subordinated to the law of the country.¹⁰⁰

In these proceedings before the United Nations Human Rights Committee, the complainants had asserted that ILO organs had arrived at the conclusion that, in the light of ILO Conventions, the right of freedom of association necessarily presupposed the right to strike. The United Nations Human Rights Committee replied that every international treaty had a life of its own and must be interpreted by the body entrusted with the monitoring of its provisions. In addition to these clearly accurate observations, the Committee stated that "it has no qualms about accepting as correct and just the interpretation of those treaties by the organs concerned".¹⁰¹ Coming after the correct allusions of the United Nations Human Rights Committee to the separate lives of international treaties and to the fact that they must be interpreted by the competent body, this remark about ILO standards can only be described as an *obiter dictum* of a committee which was, by its own avowal, not competent to deal with the matter.¹⁰² This is all the more true given that, according to article 37 of the ILO Constitution, the ICJ can alone give binding interpretations of ILO standards.

⁹⁸ According to Brupbacher, *op. cit.*, p. 10.

⁹⁹ United Nations Human Rights Committee: *Report of the Human Rights Committee*, General Assembly, 41st Session, Document A/41/40, New York, NY, 1986. Also available from the Human Rights Library of the University of Minnesota at: www1.umn.edu/humanrts/undocs/html/118-1982.htm [visited 7 Oct. 2005].

¹⁰⁰ This is also the view of von Maydell, *loc. cit.*

¹⁰¹ Unlike Brupbacher (*op. cit.*, p. 18), the Committee does not therefore recommend acceptance of the interpretation. Moreover, it is unclear which ILO organs are meant, especially as serious divergences of opinion on the right to strike exist between the Committee of Experts and the Conference Committee.

¹⁰² Such a statement is of the same import as if the supreme court of a country were to rule that, under the law of the land, the extent of the right to strike forming the subject of the action did not exist, but then went on to say that it accepted the interpretation of the supreme court of another State which applied the different standards applicable there.

As already explained, the Committee of Experts assumes that there is a general principle allowing an extensive right to strike. In its opinion, limitations therefore require special justification which must be interpreted restrictively.¹⁰³ They quote two examples in this connection: limitation of the right to strike by “essential” services is regarded as permissible only when the interruption of these services endangers the personal safety or health of the whole population or sections of the population. Thus the national legislator is denied the right, in respect of the consequences of strikes, to fulfil a wider duty to protect and provide for the welfare of its citizens extending beyond their life and health. While the Committee of Experts basically considers the right to all forms of strikes to be guaranteed, it believes that an exception might be possible in the case of purely political strikes. This wording is virtually meaningless in findings concerning actual cases. The Committee of Experts contends that strikes against government policy should always be permissible and that in practice this right to strike also encompasses strikes against a law on the day it is discussed in parliament.¹⁰⁴ The experts are silent about the questionable nature of strikes against a freely elected parliament in a State governed by the rule of law.

From time to time, the Committee of Experts relies on statements of the Committee on Freedom of Association to underpin its views. This tripartite body was set up in 1951 by the Governing Body of the ILO. Its official duties are more or less identical to those of the Fact-Finding and Conciliation Commission on Freedom of Association, which was established in 1950. The latter consists of independent experts, but as it can act only with the consent of the government concerned, it has not gained particular importance.¹⁰⁵ Its job is to ascertain facts and to try to act as mediator and conciliator. There is no disputing the fact that the Committee also concerns itself with questions of freedom of association in member States which have not ratified the relevant Conventions, i.e. Nos. 87 and 98. For this reason, its recommendations cannot be deemed to be “case law” in the sense of an interpretation of the standards laid down in Conventions. The work of the Committee on Freedom of Association is based on the

¹⁰³ ILC, 81st Session, 1994, Report III (Part 4B), para. 159.

¹⁰⁴ The experts’ observations concerned, for example, strikes in Germany during the parliamentary debate on the amendment of Article 116 of the Law on the Promotion of Employment in 1986. Labour courts forbade the trade unions to call for further strikes and some employers threatened workers with dismissal if they went on strike again (ILC, 73rd Session, 1987, Report III (Part 4A), pp. 181 et seq.; and ILC, 76th Session, 1989, Report III (Part 4A), pp. 168 et seq.).

¹⁰⁵ Minutes of the 110th Session of the Governing Body, 3-7 Jan. 1950, Appendix VI, para. 4; ILC, 33rd Session, *Record of Proceedings*, 1950, pp. 172 and 254-255.

call in the ILO Constitution to recognize the principle of freedom of association.¹⁰⁶ Moreover its members are not usually lawyers and above all they do not act as representatives of a constituent, but on their own personal responsibility.

Employers protested unambiguously at an early stage against incipient aberrations.¹⁰⁷ For obvious reasons, no issue was made of this and many other differences during the long years of the Cold War. This changed very fast after the great turning point in world politics. The author has repeatedly explained the Employers' position on this matter in the Conference Committee and in the full Conference and he did so in very great detail in 1994.¹⁰⁸ At the same time, it was suggested that, after careful preparation, this subject should be removed from the grey zone of non-binding *extra* or *contra legem* interpretations and officially submitted for discussion by the real legislator of the ILO, in other words, the full International Labour Conference. So far this proposal has gone unanswered. It is also astonishing that the experts have never addressed the numerous arguments regarding the subject, which have been put forward in ILO bodies and in legal writings. Instead, they keep on reiterating their observations from their earlier reports and General Surveys, which they quote unchanged as if they were the texts of laws.

Stocktaking

The ILO is undergoing a major change. This is not surprising since, at least in some areas, it seems to have concentrated too hard for too long on realizing ideas dating from the end of the nineteenth century, whereas the current state of advanced globalization calls for different international measures in the field of social policy. It will not achieve worldwide acceptance if it lays down a maximum number of details for a maximum number of working conditions, in the expectation that they will be valid for ever. Rather, instruments and their contents should be very flexible. The quest for basic conditions which promote rather than hinder job creation and firms' ability to compete is more of a priority than ever. Unless acceptable solutions are found, *de facto* non-compliance is likely. This has already been the fate of a considerable number of traditional ILO standards.

¹⁰⁶ This has not prevented this Committee from expressing its opinion on hundreds of detailed questions concerning freedom of association and the right to strike in the *Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, the comprehensive fourth edition (1996) of which runs to no fewer than 238 pages.

¹⁰⁷ See the statements of Mr. Waline, International Labour Office, Minutes of the 121st Session of the Governing Body, 3-6 Mar. 1953, pp. 37 et seq.

¹⁰⁸ ILC, 81st Session, 1994, *Record of Proceedings*, pp. 25/31-25/37, paras. 115-134; ILC, 81st Session, 1994, *Record of Proceedings*, pp. 28/9-28/10.

If the ILO is to set out on a new course, it will be impossible to ignore matters of international trade. These key words, which cannot be discussed in greater detail here, conceal organizational difficulties and problems of substance when deciding whether to link or to separate the principles of free, fair world trade and suitable minimum working conditions.

One hundred and seventy-eight individual States are Members of the ILO. The formation of regional groupings can, however, mean that States are no longer solely in charge of the rules and regulations governing working and social conditions, but are bound by supranational law after an appropriate transfer of sovereignty. This likewise has implications for the creation of international treaty law in the traditional sense, which has been the typical working method of the ILO to date.

The ILO must explore new avenues. It has started to do so, as outlined above. For this, new instruments focusing on fresh contents must be drawn up and there must be a shift in emphasis towards a strengthening of the services it offers. The new course must also have an impact on standards monitoring. Generally formulated principles, fundamental human rights in the sphere of labour and social law and other solutions which have been reached by consensus cannot, through interpretation, be turned into a catalogue of detailed rules. Moreover the supervisory system will frequently become follow-up organized along different lines. It takes time for such changes to happen. It is also necessary to examine whether and to what extent it would be sensible if basic provisions were no longer to apply solely to member States, but were to have a more binding effect on new addressees. Despite all these alterations, one thing is certain: since disciplinary possibilities remain inadequate, as is usual in the domain of international law, the power of open and trusting dialogue will be all the more important in the future.