



## FIRST ITEM ON THE AGENDA

**Improvements in the standards-related activities of the ILO – Articles 19, 24 and 26 of the Constitution****Executive summary**

This paper, which was requested by the Governing Body, describes on the one hand the constitutional provisions relating to the procedures for examining the action taken to give effect to instruments adopted by the Conference which have not been ratified (article 19) and the application of ratified Conventions (articles 24 and 26) and, on the other, practices adopted by the Governing Body on the basis of those provisions. Recalling that the Governing Body has already discussed certain aspects of these procedures without being able to reach a consensus, the paper identifies points which might and should be improved to ensure that these procedures and their follow-up function more smoothly, and contains proposals to that effect. Should these proposals – or some of them – be retained, the Office could present more detailed proposals to the next session of the Governing Body, taking account of the opinions expressed with a view to their adoption by the Governing Body.

1. At its 283rd Session (March 2002), the Governing Body requested an examination of the procedures relating to the application of standards, with a view to possible improvements in standards-related activities.<sup>1</sup> The objective of this examination is to strengthen the capacity of the machinery provided for in articles 19, 24 and 26 of the Constitution with a view to ensuring that: (i) Members' constitutional obligations, in particular with regard to ratified Conventions, are met in law and in practice; and (ii) these mechanisms do not overlap and function in accordance with the provisions of the Constitution or Standing Orders governing them.
2. Nearly half of the articles of the Constitution of the International Labour Organization (17 out of 40) relate to international labour Conventions and Recommendations. Out of the 17 articles, 14 refer wholly or in part to the mechanisms for the supervision of member States' performance of their obligations with regard to both unratified and ratified Conventions. The whole of the ILO's standards-related activity is governed by these provisions:
  - the preparation of standards, the form they can take (Conventions or Recommendations), the account to be taken of Members' different conditions with regard to development in the process of adoption of standards, adoption by the

<sup>1</sup> GB.283/PV, pp. V/6 to VI/4. See also GB.283/4.

Conference by a qualified majority vote of two-thirds, obligations of Members in respect of Conventions and Recommendations adopted by the Conference and supervision of compliance with such obligations (articles 19 and 30);

- reports on ratified Conventions, communication of reports to representative organizations of employers and workers and examination thereof by the Conference (articles 22 and 23);
- the procedure for making representations concerning the observance of a Convention, open to industrial associations of employers and workers, and the possibility of publishing such representations (articles 24 and 25);
- the complaints procedure, powers of the Commission of Inquiry and the action to be taken on its recommendations, the role of the International Court of Justice with respect to such recommendations and the procedure for ensuring compliance with such recommendations (articles 26-29 and 31-34);
- provisions on the registration of standards adopted by the Conference (article 20), proposed Conventions not adopted by the Conference (article 21) and interpretation of Conventions (article 37).

3. Based on this constitutional framework and in keeping with its provisions, the Governing Body and the Conference have evolved procedures as the need arose to enable these provisions to be applied. While improvements to the constitutional provisions may be deemed desirable, the status of the last two constitutional amendments, which have not yet entered into force, should prompt us to proceed with caution. Amending the Constitution is a lengthy process with an uncertain outcome. The same is not true of decisions by the Conference or the Governing Body. None the less, given the nature of the issues raised in this paper, which are central to the Organization's activity, any improvements selected will have to achieve broad consensus for their adoption in order to guarantee their effective implementation by all of the Members.

4. This paper is confined to the aspects relating to supervision of compliance with the obligations in respect of Conventions and Recommendations adopted by the Conference and ratified Conventions, with the exception of the procedure laid down in article 22, on which the Governing Body has already held discussions and introduced adjustments which have entered into force and are periodically reviewed. However, the procedures with regard to ratified Conventions are interdependent and cannot be considered in isolation or without referring to the periodic and automatic – and in this sense “regular” – procedure set forth in article 22. In this respect, the procedures laid down in articles 24 and 26, which are set in motion at the initiative of constituents (a member State, an employers' or workers' organization or a delegate to the Conference), are “special” procedures, which generally leave it to the regular machinery to supervise the effect given to Recommendations.

5. For the sake of clarity, this paper will take as a starting point the procedures as set forth in the provisions of the Constitution, then look at the way in which they are implemented (how the Governing Body or the Conference has decided to proceed). To this end, a distinction will be made between the procedures relating to the effect given to standards adopted by the Conference (unratified Conventions and Recommendations) and those relating to the application of ratified Conventions.

## **I. Procedures relating to standards adopted by the Conference**

6. One of the unique features of the ILO standards system is that member States, merely by virtue of belonging to the Organization, have legal obligations in respect of the standards adopted by the Conference even if they have not ratified them. These obligations are of a twofold nature. First, there is an automatic obligation, which begins with the adoption of new standards by the International Labour Conference, to submit the new instruments to the competent authorities with a view to taking measures to give effect at the national level to the standards adopted – Conventions or Recommendations. Second, Members are obliged to report “at appropriate intervals as requested by the Governing Body” on the position of their law and practice in regard to the matters dealt with in these standards – in particular, unratified Conventions.

### **A. Submission to the competent authorities**

7. Article 19 of the Constitution provides for the obligation of member States to submit standards adopted by the Conference to their “competent authority or authorities” for the enactment of legislation or other action, for example for ratification, in the case of Conventions (article 19(5)(a)). This obligation of submission carries a time limit (article 19(5)(b) and (6)(b)) and is subject to special conditions to take account of the situation of federal States (article 19(7)). Members must inform the Director-General of the International Labour Office of the results of such submission, “with particulars of the authority or authorities regarded as competent, and of the action taken by them”.
8. Under article 30, any Member is entitled to refer to the Governing Body a case of failure by another Member to submit standards adopted by the Conference (Conventions and Recommendations) to the competent national authority. If the Governing Body finds that there has been such a failure, “it shall report the matter to the Conference”. There is no mention of what the Conference will do with such a report.<sup>2</sup>

### **B. Reports requested by the Governing Body**

9. Article 19 (paragraphs 5(e) and 6(d)) provides that no further obligation rests upon a Member with respect to standards adopted by the Conference “except that it shall report to the Director-General of the International Labour Office, at appropriate intervals as requested by the Governing Body” on the position of its law and practice in regard to the matters dealt with in the instrument in question. This report must show the extent to which effect has been given to the provisions of the (unratified) Convention or Recommendation “by legislation, administrative action, collective agreement or otherwise”. In the case of a Convention, the report must also state the difficulties which prevent or delay the ratification of such Convention.

### **C. Implementation of these two obligations in practice and future prospects**

10. The Governing Body has entrusted the task of examining these two categories of reports to the Committee of Experts on the Application of Conventions and Recommendations, including in its mandate consideration of the information and reports presented under article 19. The Conference did likewise with regard to the mandate of the Conference

<sup>2</sup> This provision has never been used to date.

Committee on the Application of Standards (article 7(1)(b) of the Standing Orders of the International Labour Conference).

### Submission to the competent authorities

11. In cases of non-observance, the examination of Members' reports on submission leads to the adoption of observations or direct requests by the Committee of Experts, which brings certain serious cases to the attention of the Conference Committee on the Application of Standards. In order to assist governments, the Governing Body has issued a Memorandum concerning the obligation to submit Conventions and Recommendations to the competent authorities, which clarifies certain aspects of this obligation.<sup>3</sup> The Memorandum refers to the nature of the competent authority (the authority which generally has power to legislate), the extent of the obligation to submit (recalling the distinction between submission and ratification, as the obligation to submit does not imply a requirement to propose ratification), and the form of submission (submission must be accompanied or followed by a statement of proposals setting out the government's views as to the action to be taken on the instruments).
12. Submission to the competent authorities – which is unique in the international system – could be put to more rational use as a tool to enhance the promotion and visibility of the standards adopted by the Conference. Several avenues might be explored to this end. The first would consist of adhering more strictly to the constitutional provisions and examining in more detail the information communicated by governments under clauses (b) and (c) of paragraphs 5 and 6 of article 19. Another option would be to target the promotion of submission to the competent authorities – in nearly all cases national parliaments – at those authorities themselves.<sup>4</sup> Lastly, the Governing Body may wish to revisit the Memorandum revised in 1958 to take account of changes in the role of national parliaments vis-à-vis the executive branch, both with regard to legislative action and in respect of ratification.<sup>5</sup>

### Reports requested by the Governing Body

13. The examination of the reports requested by the Governing Body under paragraphs 5(b) and 6(b) of article 19 serves as a basis for a “General Survey” by the Committee of Experts, published as a Conference report and discussed by the Conference Committee on the Application of Standards at a special sitting. The record of this discussion is included in the general part of the report of the Committee submitted to plenary at the Conference.
14. Moreover, when it adopted the ILO Declaration on Fundamental Principles and Rights at Work, the Conference used article 19(5)(e) of the Constitution as the basis for the annual reporting obligation of countries that have not ratified one or more of the fundamental

<sup>3</sup> See GB.208/SC/4/5; GB.209/9/20, paras. 2-14; GB.211/SC/1/5; GB.211/15/16, paras. 2-21; GB.212/SC/4/1; and GB.212/14/21, paras. 28-34.

<sup>4</sup> The Cooperation Agreement between the International Labour Organization and the Inter-Parliamentary Union, signed on 27 May 1999, could serve as a basis for this type of advocacy. See *Official Bulletin*, Vol. LXXXII, 1999, Series A, No. 1.

<sup>5</sup> In particular, the Memorandum could be revised in the light of the obligations laid down in the Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144), ratified by 107 States.

Conventions referred to in the Declaration.<sup>6</sup> In order to dissociate the examination of the annual article 19 reports required under the Declaration from that carried out by the Conference Committee on the Application of Standards under article 7(1)(b) of the Standing Orders of the Conference, the latter provision had to be amended to provide that the Committee will consider “the information and reports concerning Conventions and Recommendations communicated by Members in accordance with article 19 of the Constitution, *except for information requested under paragraph 5(e) of that article where the Governing Body has decided upon a different procedure for its consideration*” (emphasis added). It is the Governing Body which examines the annual reports and the conclusions of the Declaration Expert-Advisers. In order to enable governments that are not represented on the Governing Body to express their views on matters relating to their own situation, the Standing Orders of the Governing Body have been amended. The Governing Body may meet as a committee of the whole in order to hold an exchange of views with representatives of governments that are not represented on the Governing Body, including, but not exclusively, concerning annual reports.

15. It should also be pointed out that the requests addressed to member States during the preparatory work for the general discussions based on an integrated approach are also based on article 19 – at least in part, as far as standards-related aspects are concerned. This constitutes additional proof of the versatility of this provision. It would seem that the flexibility it provides to the Governing Body should be maintained.
16. Thus, it does not appear that any general improvements can be made to this procedure. It is for the Governing Body, when availing itself of this procedure, to specify the extent of the information it would like to receive on the effect given to unratified instruments, in keeping with the constitutional framework. Article 19 enables information to be gathered from member States on the situation with regard to their legislation and practice. However, the scope offered by this provision for promotional action, notably for identifying obstacles to the implementation of standards – an essential prerequisite for providing technical assistance – could be explored more systematically.

## II. Procedures relating to ratified Conventions

17. There are three procedures relating to ratified Conventions: Members’ obligation to send annual reports on ratified Conventions and to communicate copies of them to the representative organizations of employers and workers, the representation procedure and the complaints procedure. As pointed out above, this paper will focus only on the representation and complaints procedures. It should be borne in mind, none the less, that each of these procedures is designed to serve a specific purpose and has its own features which should be taken into account in order to avoid overlap or duplication, while ensuring coherence of the system.

<sup>6</sup> See follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, II, B1. These annual reports were preceded by a five-yearly report on the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) (see GB.209/SC/2/3), then, as of 1997, by “special” reports on fundamental Conventions, which were in turn eliminated with the introduction of the annual reports under the Declaration of 1998 (see GB.273/3).

**A. Representation procedure – Articles 24, 25 and 26, paragraph 4**

18. The representation procedure may be engaged by an industrial association of employers or workers, which must present allegations to the Office that a Member has failed to secure the effective observance of a Convention which it has ratified. The Governing Body may communicate this representation to the government against which it is made, and “may invite that government to make such statement on the subject as it may think fit”. It is clear from the text, in particular the repeated use of the word “may”, that it is for the Governing Body at this stage (or another body empowered by it) to carry out a screening function and decide how the representation is to be handled: to forward it to the government in question *and*, if it deems it appropriate, to invite it to make a statement on the allegations.
19. If the government invited to make a statement fails to do so within a reasonable time or if the statement is not deemed to be satisfactory by the Governing Body, the latter may publish the representation and the statement.<sup>7</sup> Lastly, under article 26, paragraph 4, of the Constitution, the Governing Body may adopt the complaints procedure of its own motion if, notably in the light of the representation and the government’s reply, it is not satisfied that the Member in question is securing the effective observance of a Convention.

**Implementation of the representation procedure**

20. The Standing Orders concerning the procedure for the examination of representations currently in force were adopted by the Governing Body in the 1930s and last amended in 1980.<sup>8</sup> They govern the receivability of representations, their referral to a tripartite committee, the procedure of examination by the committee and, once the latter is in a position to make proposals, the procedure for consideration of the representation by the Governing Body. The revision of 1980 introduced two principal changes in the original text of the Standing Orders:
- (a) The first change enabled the Governing Body to empower its Officers to carry out the examination of the receivability of the representation. Previously, this was the task of the Governing Body. However, it was observed that it was difficult to make the necessary distinction between examination of the receivability of the representation as regards form, the conditions of which are laid down in article 24, and examination of the representation as regards substance. The Governing Body therefore entrusted the initial examination of receivability to its Officers, who, under article 2, paragraph 3, of the Standing Orders, “report to the Governing Body on the receivability of the representation as regards form”, in the light of their consideration of the conditions laid down in the preceding paragraph. This initial examination had formerly been entrusted to the Director-General.<sup>9</sup>
  - (b) The second change clarified the distinction between the powers delegated to the tripartite committee and those exercised by the Governing Body directly. Briefly, the Governing Body empowers it to perform all the functions formerly carried out by the

<sup>7</sup> On the implementation of article 25, see GB.273/LILS/1.

<sup>8</sup> See GB.212/SC/5/2.

<sup>9</sup> Article 2, paragraph 2, of the Standing Orders provided that “the Director-General of the International Labour Office shall communicate to the Governing Body all the information in his possession as regards the receivability of the representation without proceeding for that purpose to put any part of the procedure into operation”.

Governing Body until the committee is able to submit proposals for a decision on the representation. As a result, the procedure was simplified, as the committee does not have to report to the Governing Body on each stage of the procedure.

In addition, two procedural amendments were introduced: first, the possibility of referring the examination of representations relating to the freedom of association Conventions to the Committee on Freedom of Association, in order to avoid the same issue being examined twice by the Committee; and, second, the possibility for a government against which a representation has been made to request the tripartite committee to hear a representative of the government or to request a direct contacts procedure “to obtain ... information on the subject of the representation, for presentation to the committee”.

#### Improve the procedure through greater transparency?

21. The Governing Body has already examined certain aspects of this procedure without reaching a consensus on improvements to be made or even on the need for such improvements. The issues relating to the origin of the practice of referring representations to a tripartite committee or to the Committee on Freedom of Association, depending on the substance of the matter, the possible diversification of examination procedures, and the effect of the adversarial procedure under article 24 on the regular supervisory machinery under article 22, have already been considered.<sup>10</sup> Furthermore, the reasons for possible revision of the procedure (increase in the number of representations, risk of overlapping of procedures, confidentiality) as well as the objectives of the revision have been examined and solutions to these issues put forward.<sup>11</sup> With the exception of the question of confidentiality, which relates essentially to the implementation of article 25 and on which no conclusions have been adopted,<sup>12</sup> the Governing Body has considered that these issues could be examined in the broader context of the reflection on the Organization’s standards-related policy.
22. Questions such as the overlapping of procedures and the effect of the representation procedure on the regular supervisory procedures are still pending. Furthermore, certain points have been raised concerning the details of the receivability of representations. Without returning to the issues already examined, some explanations and suggestions relating to receivability, the repetition of procedures and prescription are in order.

#### Conditions of receivability

23. Since 1980 the examination of the receivability of representations lies with the Officers of the Governing Body, which ratifies the proposal of its Officers without discussion. The six conditions of receivability contained in article 2, paragraph 2, of the Standing Orders, are stated in precisely the same terms, with one exception (the specific reference to article 24 in the representation), as those used in article 24. Four of these conditions are only conditions of form, while the other two are conditions of both form and substance: the fact that the representation must emanate from an industrial association of employers or of workers, on the one hand (article 2(2)(b) of the Standing Orders), and on the other, the details concerning the point about which the representation is made (article 2(2)(f) of the Standing Orders). Furthermore, when the Officers of the Governing Body submit their report on the receivability of the representation, the Governing Body, in accordance with

<sup>10</sup> See GB.273/LILS/1 and GB.273/8/1, paras. 2-58.

<sup>11</sup> See GB.276/LILS/2 and GB.276/10/1, paras. 56-67.

<sup>12</sup> See GB.277/LILS/1 and GB.277/11/1, paras. 2-17.

article 2, paragraph 4, “shall not enter into a discussion of the substance of the representation”. The government against which the representation is made is not called upon, at this stage, to submit its observations on these two points, and the procedure is automatically set in motion.

24. Questions relating to receivability may be raised by the government in question once the Governing Body, on the basis of the report of its Officers, has given a positive response. The tripartite committee, in the possession of additional information communicated by the government or the organization that has made the representation, may recommend that the Governing Body review its decision regarding receivability. The difficulty for the Officers of the Governing Body is that they are required to make their recommendations to the Governing Body without having access to specific criteria for the examination of these conditions.
25. In the absence of a definition in the Constitution of the notion of industrial association of employers or of workers as contained in article 24 of the Constitution,<sup>13</sup> the criteria used to decide whether the complainant organization is an industrial association in the sense of article 24 should be as clear as those used for complaints lodged with the Committee on Freedom of Association. In particular, while the Governing Body cannot be bound by any national definition of these terms or any restriction or imposed exclusion that would be incompatible with the standards and principles of freedom of association, it should nevertheless be able to take into account the evident interest the complainant organization may have in the question. It would certainly be possible to envisage specifying the condition of receivability contained in article 2, paragraph 2(b), of the Standing Orders, on the basis of the principles progressively elaborated by the Committee on Freedom of Association in its reports submitted to the Governing Body.<sup>14</sup>
26. The condition established in article 2, paragraph 2(f), of the Standing Orders, namely the indication of the point on which “the Member against which it is made has failed to secure the effective observance within its jurisdiction of the said Convention”, concerns both the form and the substance of the representation. While it is true that the Governing Body cannot discuss the substance of the representation when it decides whether or not it is receivable, in the absence of the objective elements of assessment that are provided to it later by the tripartite committee, it must nevertheless be reasonably certain that the indication provided in the representation is appropriate to support it, taking into account the obligations of the Convention in question.
27. These questions could be decided either by the Officers of the Governing Body, on the basis of a specific report provided by the Office, which requests copies of the statutes or of relevant documents in cases where the complainant organization cannot be indisputably identified as an industrial association, or by the Governing Body itself, on the basis of doubts that might be raised by its Officers as to one, or even both, of the conditions of receivability of a particular representation.

<sup>13</sup> This notion of industrial organization is broader than that of representative organization in the sense of articles 3 and 23 of the Constitution.

<sup>14</sup> See paras. 39-40 of the “Procedures of the Fact-Finding and Conciliation Commission and the Committee on Freedom of Association for the examination of complaints alleging violations of freedom of association” (*Digest of decisions and principles of the Freedom of Association Committee*, 4th edition, 1996, Annex I).



## Repetitive nature

28. The repetitive nature of certain representations has sometimes been raised. The question could be asked whether the principle of *res judicata* should be invoked in the case of a representation addressing the same subject as a previous representation. If the principle of *res judicata* applies legitimately in national legal systems where the decision is generally followed by execution measures, the same does not apply in the international legal order, as decisions of ILO bodies can only be implemented through the voluntary action of the Member concerned. Furthermore, the Constitution does not fix any time limits for a Member that has not ensured the application of a Convention to adopt the measures decided by the Governing Body on the basis of the conclusions and recommendations of its tripartite committee.<sup>15</sup>
29. Nevertheless, it is clear that a Member that has not fully applied the decisions of the Governing Body relating to a representation examined previously cannot be considered as having secured “the effective observance within its jurisdiction of any Convention to which it is a party”. The condition stipulated in article 24 and recalled in article 2, paragraph 2(f), of the Standing Orders would be fulfilled in this case. The question remains, however, of the time the Member has to meet its obligations. The follow-up to the implementation of the Governing Body’s decisions is carried out, in the framework of the regular supervisory machinery, by the Committee of Experts on the Application of Conventions and Recommendations. Several proposals could be made. One solution would consist, here again, of applying *mutatis mutandis* the procedural principles elaborated by the Committee on Freedom of Association.<sup>16</sup> Another solution could also allow the Officers of the Governing Body to reach a decision on an objective basis. For any further representation with the same subject matter, lodged before the Committee of Experts has had the opportunity to examine the measures adopted by the government against which it is made, the Officers of the Governing Body would recommend postponing the establishment of the tripartite committee responsible for examining the representation pending receipt of the report of the Committee of Experts.

## Prescription

30. The question of representations concerning past matters could also be examined. No period of prescription has been fixed by the Constitution for the examination of representations. The Committee on Freedom of Association has adopted a principle of common sense in the matter, adhering to the notion that “it may be difficult – if not impossible – for a government to reply in detail to allegations regarding matters which occurred a long time ago”.<sup>17</sup> This principle is just as valid for representations, the procedure only being justified insofar as the facts relating to the non-application continue to have effect at the time the representation is lodged.

<sup>15</sup> In the case of recommendations by a Commission of Inquiry established following a representation, the Member has a time limit of three months to make known whether or not it accepts the recommendations of the Commission of Inquiry or if it decides to refer the complaint to the International Court of Justice (article 29, paragraph 2, of the Constitution), and the report of the Commission of Inquiry must make provision for the time limit for the implementation of the recommendations (article 28).

<sup>16</sup> “Procedures ...”, *op. cit.*, paras. 41-42bis.

<sup>17</sup> “Procedures ...”, *op. cit.*, para. 67.

## Follow-up to Governing Body decisions

31. The follow-up to measures taken by a government against which a representation has been made, in accordance with the application of the decisions adopted by the Governing Body with regard to the said representation, is carried out by the Committee of Experts on the Application of Conventions and Recommendations, once the representation procedure has been pronounced closed. This follow-up could certainly, at least in some cases, be more effective if it were accompanied by a proposal of assistance from the Office. Depending on the circumstances of the representation and the content of the statement made by the government during the course of the procedure, the Governing Body could propose to the government in question to request assistance from the Office<sup>18</sup> and to be informed of the outcome.
32. The above points could be taken into consideration by the Officers of the Governing Body or by the Governing Body itself when it examines the receivability of representations, without there being any need to amend the Standing Orders. Nevertheless, in order to improve the transparency of the procedure and to ensure its harmonious operation, it would be desirable, if the Governing Body so decides, to make any amendments to the Standing Orders that might be necessary to supplement them on the points raised above.

**B. Complaints procedure – Articles 26 to 29 and 30 to 34**

33. The complaints procedure is open to a Member of the Organization if it is not satisfied that another Member is securing the effective observance of any Convention which both have ratified (article 26, paragraph 1), by a delegate to the Conference, or by the Governing Body (article 26, paragraph 4). The Governing Body “may, if it thinks fit, before referring such a complaint to a Commission of Inquiry, ... communicate with the government in question”, and it may invite the government to make a statement on the complaint. If the Governing Body does not think it necessary to communicate the complaint to the government, if the government does not respond, or if the response is unsatisfactory, it “may appoint a commission of inquiry to consider the complaint and to report thereon” (article 26, paragraph 3). Article 28 details the content of the report of the Commission: findings on all questions of fact “relevant to determining the issue between the parties”; and recommendations “as to the steps which should be taken ... and the time within which they should be taken”.
34. The report of the Commission is communicated to the Governing Body and to the government(s) concerned and must be published (article 29, paragraph 1). Each of the governments concerned must indicate “within three months ... whether or not it accepts the recommendations” of the Commission and, if not, “whether it proposes to refer the complaint to the International Court of Justice” (article 29, paragraph 2). The Court, whose decision shall be final (article 31), may affirm, vary or reverse the findings or recommendations of the Commission of Inquiry (article 32).

<sup>18</sup> In this regard it should be recalled that a tripartite committee responsible for the examination of a representation had suggested to the Governing Body to request the Director-General to propose his good offices “in order to consider how an equitable settlement might be arrived at” between several countries concerned directly or indirectly by the representation (see GB.265/12/6, para. 26). Nevertheless, the proposal currently being made is to invite the government(s) in question to use the assistance services that can be provided by the Office.

35. A defaulting government “may at any time inform the Governing Body that it has taken the steps necessary to comply with the recommendations” and “may request it to constitute a Commission of Inquiry to verify its contention” (article 34). In the event that a Member does not apply the recommendations of the Commission of Inquiry within the time specified, “the Governing Body may recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith” (article 33). These measures must be lifted if a decision in favour of the government in question is adopted by the Commission of Inquiry constituted in accordance with article 34, or by the International Court of Justice.

#### Implementation of the complaints procedure

36. The Governing Body has not adopted any rules regarding the procedure to adhere to with a view to the examination of complaints. In each case, the Officers of the Governing Body have submitted to the Governing Body similar recommendations on the procedure to apply in this area basing themselves, *mutatis mutandis*, on those that were accepted by the Governing Body during the examination of the first complaint that gave rise to the constitution of a Commission of Inquiry.<sup>19</sup> The Governing Body affirmed the judicial nature of the procedure provided for in articles 26-29 and 31-34 of the Constitution and judged it to be inconsistent with this judicial nature that there should be any discussion of the merits of a complaint before having before it the information communicated by the complainant and the contentions of the government against which the complaint is filed, “together with an objective evaluation of these contentions by an impartial body”, the Commission of Inquiry. In the absence of constitutional or regulatory indications, the Governing Body also specified that the members of the Commission of Inquiry, “who would serve as individuals in their personal capacities, would be chosen for their impartiality, integrity and standing, and would undertake by a solemn declaration to perform their duties and exercise their powers ... ‘honourably, faithfully, impartially and conscientiously’. A solemn declaration in these terms would correspond to that made by judges of the International Court of Justice”.<sup>20</sup>
37. The Governing Body, again on the recommendation of its Officers, has also decided that the Commission of Inquiry should determine “its own procedure in accordance with the provisions of the Constitution of the Organization and the report of the Officers approved by the Governing Body at its 148th Session”.<sup>21</sup> Consequently, the Commissions of Inquiry have adopted rules of procedure that, *mutatis mutandis*, are similar.<sup>22</sup>

<sup>19</sup> See *Minutes of the 148th Session of the Governing Body*, Appendix XXIII, “Supplementary Item on the Agenda: Complaint filed by the Government of Ghana concerning the observance by Portugal of the Abolition of Forced Labour Convention, 1957”, paras. 6-10.

<sup>20</sup> *ibid.*, para. 10.

<sup>21</sup> See *Minutes of the 149th Session of the Governing Body*, Appendix XV, “Fifteenth Item on the Agenda: Complaint filed by the Government of Ghana concerning the observance by Portugal of the Abolition of Forced Labour Convention, 1957”, Report of the Officers of the Governing Body, para. 6.

<sup>22</sup> See, for example, the rules of procedure of the first Commission of Inquiry (*Official Bulletin*, Vol. XLV, 1962, No. 2, Supplement II, paras. 16-27 and 46-54) and those of the last Commission to date (*Official Bulletin*, Vol. LXXXI, 1998, Series B, Special Supplement, paras. 12-85 and Appendix III).

- 38.** In the event of a complaint being filed it is for the Governing Body to determine the action to be taken. Paragraphs 2 and 3 of article 26 provide it with four possible options:
- to reject the complaint;
  - to collect additional information, by all appropriate means;
  - to communicate with the government in question, in accordance with the procedure provided in article 24, inviting it to make a statement on the matter under examination; and
  - to cause a commission of inquiry to be constituted immediately.
- 39.** The exclusive use of the word “may” each time the role of the Governing Body is raised in the abovementioned provisions demonstrates the extent of its powers up until the moment when the Commission of Inquiry is constituted and submits its report for the Governing Body to note. While most commissions of inquiry have recommended that the follow-up to their reports should come under the Committee of Experts on the Application of Conventions and Recommendations, in the framework of the regular examination of reports on the application of ratified Conventions, the Governing Body still has a certain role to play, namely in cases where the government in question does not accept the recommendations of the Commission of Inquiry or does not conform within the time stipulated by the Commission to those recommendations. The Governing Body recently demonstrated its ability to adapt by adopting procedures focusing on assistance in the implementation of the recommendations of the Commission of Inquiry which, while not expressly provided for in the Constitution, are nonetheless in keeping with its spirit, which is to ensure the application of the obligations freely accepted by Members when they ratify international labour Conventions.
- 40.** The complaints procedure does not appear to be in need of improvement at this stage. It is a procedure that should be reserved for particularly important cases calling into question the application of ratified Conventions. In this regard, the only question that could be examined by the Governing Body would be how to retain a hierarchy between these various procedures (articles 22, 24 and 26) with a view to avoiding overlaps. While this hierarchy is not expressly established in the Constitution, it may be inferred from a reading in good faith of its provisions.

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- 41.** In the light of the discussions the Office will submit detailed proposals for improvements, if necessary, to the next session of the Governing Body.

*For discussion.*

Geneva, 29 September 2003.