

**FOR DECISION**

FIFTH ITEM ON THE AGENDA

Developments concerning the question of the observance by the Government of Myanmar of the Forced Labour Convention, 1930 (No. 29)**Preparations for the Governing Body to request an advisory opinion of the International Court of Justice**

1. The present document traces its origins to conclusions reached earlier by the International Labour Conference and the Governing Body. At its 95th Session (June 2006), the International Labour Conference adopted the report of the Selection Committee, which had concluded that “the ILO has the possibility to seek an advisory opinion from the International Court of Justice which would ... require the formulation of a specific legal question relating to the Forced Labour Convention, 1930 (No. 29)”.¹ At its November 2006 session, the Governing Body examined elements that could be brought before the Court for this purpose.²
2. After examining a document prepared by the Office, which set out such elements and other relevant considerations in relation to developments concerning the question of the observance by the Government of Myanmar of the Forced Labour Convention, 1930 (No. 29), the Governing Body, at its 297th Session (November 2006), concluded in part:

Following the Conference conclusions in June 2006, a specific item would be placed on the agenda of the March 2007 session of the Governing Body, to enable it to move on legal options, including, as appropriate, involving the International Court of Justice. The Office should therefore make necessary preparations for the Governing Body to request an advisory

¹ Second Report of the Selection Committee on the additional agenda item: Review of further action that could be taken by the ILO in accordance with its Constitution in order to: (i) effectively secure Myanmar’s compliance with the recommendations of the Commission of Inquiry; and (ii) ensure that no action is taken against complainants or their representatives, International Labour Conference, 95th Session (31 May–15 June 2006), *Provisional Record* No. 3-2, June 2006, p. 11, adopted by the Conference at its sitting of 16 June 2006.

² See GB.297/8/2 (Nov. 2006), paras 3–13.

opinion of the International Court of Justice on specific legal question(s), without prejudice to the possibility that a member State could take action on its own initiative.³

3. To respond to the request of the Conference and the Governing Body, the Office has prepared a possible “exact statement of the question upon which an opinion is required”⁴ as set out in the appendix. It focuses on the legal issue concerning the obligations of Myanmar relating to Convention No. 29 which arose after the Commission of Inquiry made its recommendations, i.e. the claim by the Myanmar authorities of their right to prosecute individuals who lodge allegedly false complaints of forced labour. As the Governing Body may recall, this claim and the actual action taken by the authorities was the reason why the Liaison Officer had to be instructed not to entertain further complaints. In light of the signature on 26 February 2007 of a Supplementary Understanding between the International Labour Office and the Government of Myanmar (see GB.298/5/1), there would seem to be no reason to submit a request for an advisory opinion on this question at the moment. Thus the Governing Body may wish to keep suspended a referral of this question to the International Court of Justice.
4. At a later date, taking into account the implementation of the Supplementary Understanding, the Governing Body would be able to consider whether or not it would be necessary to submit a relevant question concerning the interpretation of Convention No. 29 to the Court. Such a question could be submitted, together with all relevant documentation, to the Court pursuant to article 65 of its Statute, Article IX of the Agreement between the United Nations and the International Labour Organization, and article 37(1) of the ILO Constitution.
5. However, apart from a question relating to the interpretation of the Convention, there are other questions that the Governing Body may wish to consider in the event that an advisory opinion is sought from the International Court of Justice. The first would concern the interpretation of the ILO Constitution. To the extent that the Governing Body decides to refer *any* question of interpretation to the International Court of Justice, it would be logical to submit the complementary question as to whether such interpretation sought in the form of an advisory opinion could or should be recognized as binding for all Members under article 37(1) of the Constitution. This question, which has for some time posed a theoretical issue, would immediately become of great practical significance should the Governing Body decide to submit a request for an advisory opinion to the Court.
6. The second question, to which reference was made during previous discussions, could relate to the more general obligations that Members may have under the Constitution and other relevant rules of international law.⁵ For example, should the Governing Body, in the light of the experience of the implementation of the Supplementary Understanding, come to the conclusion that the required cooperation and actual progress in implementation of the recommendations of the Commission of Inquiry do not meet the relevant threshold, it

³ GB.297/PV (Nov. 2006).

⁴ Article 65 of the Statute of the International Court of Justice provides:

“1. The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.

2. Questions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request containing an exact statement of the question upon which an opinion is required, and accompanied by all documents likely to throw light upon the question.”

⁵ See Vienna Convention on the Law of Treaties, 1961, especially Article 31.

may become necessary to examine whether and in what terms such a question would be formulated.

7. *The Governing Body, acting under the authorization of the International Labour Conference, is therefore invited to:*

- (a) examine the statement of the question, as set out in the appendix, upon which an advisory opinion of the International Court of Justice is required, bearing in mind that the Governing Body may wish to defer submission of the request and to modify it at a later session in light of further developments; and***
- (b) request the Director-General to bring further developments which are relevant to this issue to the attention of the Governing Body.***

Geneva, 7 March 2007.

Point for decision: Paragraph 7.

Appendix

*Question to be submitted, at a time determined by the Governing Body, to the International Court of Justice on behalf of the International Labour Organization with a request for an advisory opinion*¹

Taking into account the relevant information,² and in the context of the object and purpose of the ILO Constitution³ and of the Forced Labour Convention, 1930 (No. 29),⁴ and the undertakings by Myanmar to give effect to their provisions in good faith:

- (1) Do the requirements of the Forced Labour Convention, 1930 (No. 29), imply that complaints of forced or compulsory labour can be made: (i) without any sort of intimidation of persons who complain or seek to make such complaints, and (ii) in conditions such that complainants may have sufficient confidence that their complaints will be objectively examined by the national authorities with a view to the prosecution of, and the imposition of adequate and strictly enforced penalties on, those who exact forced or compulsory labour?
- (2) If the answer to either part of the first question is in the affirmative, and taking into account the national legal regime governing the prosecutorial and judicial system for handling complaints of forced or compulsory labour, is the public assertion by the Government of a right to prosecute persons for making false allegations of forced or compulsory labour compatible with the requirements of the Forced Labour Convention, 1930 (No. 29)?

¹ As noted in paragraph 5 of this document, an additional question or questions could be posed by the Governing Body for submission of a request for an advisory opinion, should it deem this appropriate in the light of further developments.

² In particular:

- (a) Articles 92 and 93(1) of the United Nations Charter, and articles 36, 38, 41, 63 and 65 of the Statute of the International Court of Justice;
- (b) Article IX, paras 2–3, of the Agreement between the United Nations and the International Labour Organization;
- (c) the findings and recommendations of the Commission of Inquiry established to examine the observance by Myanmar of its obligations in respect of the Forced Labour Convention, 1930 (No. 29), the observations of the Committee of Experts on the Application of Conventions and Recommendations, the reports of the Committee on the Application of Standards of the International Labour Conference and other relevant conclusions, resolutions and reports adopted by the International Labour Conference;
- (d) other relevant UN Declarations, including the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UN resolutions and other relevant UN documents; and
- (e) the relevant circumstances noted by the Governing Body at the time it decides to request an advisory opinion of the International Court of Justice.

³ In particular, articles 1, 22, 29–33, and 37(1) of the ILO Constitution, and the Declaration of Philadelphia annexed thereto.

⁴ In particular, its articles 1 and 25.