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**FOR DEBATE AND GUIDANCE**

## EIGHTH ITEM ON THE AGENDA

**Developments concerning the question  
of the observance by the Government  
of Myanmar of the Forced Labour  
Convention, 1930 (No. 29)****Legal aspects arising out of the  
95th Session of the International  
Labour Conference****I. Introduction**

1. The 95th Session of the International Labour Conference (Geneva, 2006) had on its agenda an item entitled: “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”. The conclusions reached by the Conference in the context of article 33 of the ILO Constitution included provision for the Governing Body to examine whether or not a set of specific points had been met by the Government.<sup>1</sup> These conclusions and those reached earlier by the Conference were taken with a view to having full effect given to the recommendations of the Commission of Inquiry appointed under article 26 of the Constitution of the International Labour Organization to examine the observance by Myanmar of the Forced Labour Convention, 1930 (No. 29). As described in document GB.297/8/1, the pending issues in relation to the application of Convention No. 29 by Myanmar essentially deal with the need to release from prison and end ongoing prosecutions against certain persons who had lodged complaints with the ILO in the past, and the establishment of a credible mechanism, with the necessary guarantees and an ILO presence of requisite strength, for addressing complaints of forced labour.
2. The discussion at this session of the Governing Body could give preliminary consideration to the question of enabling the Conference at its 2007 session to examine what further action may be required in addition to a review in the Committee on the Application of Standards.

<sup>1</sup> Appendix to *Provisional Record* No. 3-2 (& Corr.), Second Report of the Selection Committee, International Labour Conference, 95th Session (Geneva, 2006), and in particular p. 12.

3. The Conference further asked the Office to provide legal information in relation to two aspects: matters that could be brought before the International Court of Justice, mentioning article 37(1) of the ILO Constitution (Part II below), and “remedies that may exist under international criminal law for action against perpetrators of forced labour” (Part III below).<sup>2</sup> In light of the complexities of certain aspects of these issues, the current document addresses these topics only in tentative terms.

## **II. Referral to the International Court of Justice**

4. Under article 37(1) of the ILO Constitution, any question or dispute relating to the interpretation of the Constitution or a Convention “shall be referred for decision” to the International Court of Justice (the Court or the ICJ). As a specialized agency of the United Nations, the Organization is authorized to request advisory opinions of the Court on “legal questions arising within the scope of its activities”.<sup>3</sup> On that basis two main avenues involving the ICJ were sketched out and are reviewed in detail below.<sup>4</sup>

### **A. Concerning a request by the Organization for an advisory opinion of the International Court of Justice**

5. *Framing a question.* A request for an advisory opinion by the Organization would entail submission of an exact statement of the question upon which an opinion is required, accompanied by all documents likely to throw light upon the question. The Court may give an advisory opinion on any such question under article 65(1) of its Statute. The jurisprudence of the Court suggests that the careful framing of a question or questions is critical for the success of the endeavour. For this reason, the Office suggests that the Governing Body examine this issue in two stages, the current one to review possible elements that could be brought before the Court and the vetting, at a later session, of the precise question(s) in relation to which the Organization would, if the situation then so justifies, request an advisory opinion of the Court.

<sup>2</sup> In addition, remedies in the nature of compensation and other forms of reparations provided to victims have been recognized by the Committee of Experts on the Application of Conventions and Recommendations as a part of a State’s obligations to ensure the effectiveness of ILO Conventions, particularly those guaranteeing basic rights. The Committee has urged governments to use and strengthen remedies as well as sanctions in applying their obligations, including in relation to Conventions that do not contain specific provisions in this regard. Report of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference, 86th Session, 1998, General Report, paras. 183-186. Compensation mechanisms could be established within Myanmar or, with the Government’s agreement, in an arrangement involving the international community. For instance, in some such arrangements involving other countries, under which individuals received compensation, contributions to schemes were made by private companies which had benefited from the exaction of forced labour during the Second World War.

<sup>3</sup> See article 96(2) of the UN Charter and article IX, para. 2, of the UN-ILO Agreement.

<sup>4</sup> The option under article 37(2) of the Constitution, which provides for establishment of a tribunal for the expeditious determination of any dispute or question relating to the interpretation of a Convention, was also included in the background document for the Conference discussion (*Provisional Record* No. 2, International Labour Conference, 95th Session (Geneva, 2006), para. 24, but was not retained in the conclusions.

6. *Factual context.* The request for an advisory opinion would be posed taking into account Myanmar's conduct in relation to its obligations under the Constitution and under the Forced Labour Convention, 1930 (No. 29). In this regard, the extensive record of official documentation of the ILO and of the United Nations relating to Myanmar's actions would be especially relevant to submit to the Court in relation to the legal question.<sup>5</sup> Of particular note would be the context of the Government's own involvement and responsibility for forced labour practices, as well as the control and operation of the prosecutorial and judicial systems in Myanmar.<sup>6</sup>
7. *Possible elements of a question or questions.* A range of possible elements could be considered in relation to the type of request to be presented to the Court in a request for an advisory opinion. The choice will depend in part on the steps, if any, taken by Myanmar in relation to giving full effect to the recommendations of the Commission of Inquiry.
- (1) In light of the Government's practice and assertion of its right, in a context of persisting exaction of forced labour, of prosecuting persons on allegations of lodging or seeking to lodge false complaints of forced labour, one request for the Court's opinion could focus on the compatibility of such a position with the obligations of a Member under the Forced Labour Convention, 1930 (No. 29), and in particular its articles 1 and 25.<sup>7</sup> A request of this nature could give particular attention to a State party's obligations to interpret and apply the Convention in good faith and in the light of its object and purpose.
  - (2) In light of the Government's failure to give full effect to the recommendations of the Commission of Inquiry, in particular relating to the establishment of a mechanism, with adequate guarantees, to ensure thorough investigation, prosecution and adequate punishment of those found guilty of exacting forced or compulsory labour, a question could focus on the compatibility of such a situation with the obligations of a Member under the ILO Constitution.

<sup>5</sup> It would be important to present, in particular, the Report of the Commission of Inquiry, 1998 (*Forced labour in Myanmar (Burma), Report of the Commission of Inquiry appointed under article 26 of the Constitution of the International Labour Organization to examine the observance by Myanmar of the Forced Labour Convention, 1930 (No. 29)*, Geneva, 2 July 1998), and the subsequent observations of the Committee of Experts on the Application of Conventions and Recommendations and conclusions of the Committee on the Application of Standards of the International Labour Conference. In addition, the documentation could include the reports of the ILO Liaison Officer and statements of the Government of Myanmar to the Director-General and the ILO as reported to the Governing Body and International Labour Conference, along with the conclusions reached by the Conference. See also, for instance, *Situation of human rights in Myanmar*, UNGA Res. 60/233 (23 March 2006) and UNGA Doc. A/61/369 (21 Sep. 2006), Note by the Secretary-General, *Situation of human rights in Myanmar*.

<sup>6</sup> See in particular, UNGA Res. 60/233 (ibid.), and UNGA Doc. A/60/221 (12 Aug. 2005), Note by the Secretary-General, *Situation of human rights in Myanmar*, Recommendations of the Special Rapporteur contained in paras. 106 (prosecution in accordance with international standards) and 111 (independence of the judiciary), and UNGA A/Res./52/137 of 12 Dec. 1997, para. 8.

<sup>7</sup> Under article 1, each Member ratifying the Convention "undertakes to suppress the use of forced or compulsory labour in all its forms within the shortest possible period ...". Article 25 provides that the illegal exaction of forced or compulsory labour shall be punishable as a penal offence and that member States parties shall ensure that the penalties imposed by law are really adequate and strictly enforced.

(3) A possible further request might seek to clarify, in terms of a specific question formulated following further research, any other legal consequences that may be inferred from the situation in terms of general international law.

8. *Procedure governing requests for advisory opinions.*<sup>8</sup> Based upon ILO practice in relation to seeking advisory opinions from the Permanent Court of International Justice at the time of the League of Nations, the Office would forward to the ICJ the specific legal question as approved by the ILO Governing Body acting pursuant to the authorization of the Conference at its 95th Session. The Registrar of the Court would then provide notice of the request for an advisory opinion to all States entitled to appear before the Court (in practice all Members of the United Nations).<sup>9</sup> These States as well as international organizations likely to be able to furnish information on the question are then notified that the Court is prepared to receive, within a fixed time limit, written statements or to hear, at a public sitting, oral statements relating to the question (Statute, article 66). States and organizations which have presented written or oral statements may comment on the statements made by other States or organizations. Based on the practice of the Court, it is estimated that around eight or nine months would elapse between the submission of a request and the rendering of the advisory opinion, unless a request, which would need to be well-founded, for an urgent opinion was granted.

## **B. Concerning a request for a binding ruling by the International Court of Justice under article 37(1) of the Constitution**

9. As noted above, article 37(1) of the Constitution provides for “referral for decision” of any “question or dispute relating to the interpretation of this Constitution or of any subsequent Convention concluded by the Members”.<sup>10</sup> Article 36(1) of the Statute of the Court vests it with jurisdiction over “all cases which the parties refer to it and all matters specifically provided for ... in treaties or conventions in force” – a provision which encompasses the ILO Constitution and Convention No. 29. Reading the Statute of the Court together with the ILO Constitution suggests that article 37(1) of the ILO Constitution constitutes what is termed a “compromissory clause”. Thought could also be given to whether the Court could interpret article 37(1) as providing a basis for an advisory opinion on a question of interpretation to be considered as binding on the ILO and on the States parties to the Convention involved. This would mean that any ruling by the Court on the issue or issues

<sup>8</sup> The procedure applicable to requests for advisory opinions is set out in articles 65 to 68 of the Statute of the International Court of Justice.

<sup>9</sup> All Members of the United Nations are parties to the Statute of the International Court of Justice. United Nations Charter, article 93(1).

<sup>10</sup> The French text, which is equally authoritative, provides that: “Toutes questions ou difficultés relatives à l’interprétation ... seront soumises à l’appréciation de la Cour”.

posed would have binding force as between the parties to a particular case.<sup>11</sup> The Court's judgement can be enforceable through the United Nations Security Council.<sup>12</sup>

10. *Role of Members and procedure.* In accordance with article 37(1), action can be taken before the Court in relation to the interpretation of the Constitution by any ILO Member, and in relation to interpretation of Convention No. 29 as between any of the States parties to that instrument.
11. Of course, any State invoking the jurisdiction of the Court under article 37(1) of the ILO Constitution would have to satisfy the requirements of the Statute of the International Court of Justice in relation to contentious cases (Statute of the Court, articles 34 to 64). Other parties to the Convention in question are notified by the Registrar of the Court, and each of these States has the right to intervene in the proceedings (Statute, article 63).
12. A review of the contentious cases already pending on the docket of the Court suggests that it would be unlikely for a party to obtain a binding ruling in less than two years from the time of filing. If the Court considers that circumstances so require, it has the power to indicate any provisional measures which ought to be taken to preserve the respective rights of either party (Statute, article 41).
13. *Role of the Organization.* Since a State party to a treaty would be bringing a matter before the Court on its own, or alongside other States which are also parties to the treaty, no decision of the Conference or of the Governing Body is required. However, the Office could, with a view to the protection of the interests of the Organization and at the request of a Member, provide legal assistance in the framing of the issues in line with what is suggested above, and in the identification of relevant documentation (the basis of the case being basically the same as for an advisory opinion). In addition, under the ICJ rules, the Court may request the ILO as a public international organization to provide information relevant to the case. It would also be possible for the ILO to submit information on its own initiative to the Court (Statute, article 34).

### III. Information concerning international criminal law in relation to forced labour

14. In the conclusions adopted by the 95th International Labour Conference in 2006, it was suggested that the Office should provide information about criminal remedies that may exist under international law for action against perpetrators of forced labour in the context of Myanmar.
15. States parties to the Forced Labour Convention, 1930 (No. 29) have an obligation under its article 25 to ensure adequate criminal enforcement at domestic level against the illegal exaction of forced labour or compulsory labour. In the absence of such enforcement in Myanmar – and indeed the threat of and actual prosecution by the State of those who seek to provide information of violations – alternate means for bringing perpetrators of forced

<sup>11</sup> Statute of the International Court of Justice, article 59. Under article 63 of this Statute, the construction of a Convention would be equally binding on any party to it which had intervened in the proceedings. A judgement may also declare the *erga omnes* character of certain norms, meaning that all States have a legal interest in their protection.

<sup>12</sup> If any State party to a case “fails to perform the obligations incumbent upon it under a judgement rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgement” (United Nations Charter, article 94(2)).

labour to justice may be considered. As outlined below, these involve the possible use of international criminal law mechanisms and the potential exercise of national criminal jurisdiction as recognized under international law.

16. As a general matter, a court will order a remedy or impose a penalty only when it can exercise its jurisdiction in relation to the person, the time frame and the subject matter involved. Whether at international or the national level, before imposing a criminal remedy/penalty, a court exercising criminal jurisdiction would assure itself that:
- (a) it has jurisdiction over the person accused;
  - (b) the prosecution has demonstrated in fact, against a high standard of proof, that the accused has, in the relevant time period, committed acts which correspond to the elements of a specified crime;
  - (c) procedural safeguards to protect a person accused of a crime have been respected; and
  - (d) the type of penalty to be imposed falls within the scope of the court's jurisdiction under the applicable law.
17. Since the Commission of Inquiry presented its report in 1998, important developments have occurred in relation to international criminal law and enforcement. Certain aspects remain in evolution and do not lend themselves to definitive statements at this juncture. The text which follows should be read in this light.

## A. International Criminal Court

18. On 1 July 2002, the Rome Statute of the International Criminal Court (ICC) entered into force, thus establishing a new international institution. In a manner that is complementary to national criminal jurisdictions, the ICC can exercise jurisdiction over persons for the most serious crimes of concern to the international community as a whole, as referred to in the Statute (see Rome Statute, Preamble and article 1). In this way, individual perpetrators, including military and government officials within the jurisdiction of the ICC, may be held personally accountable for their actions, through criminal prosecution and, as applicable, the imposition of penal and other sanctions. The legal and political hurdles to successful prosecution should be fully taken into account, however.
19. *Jurisdiction.* The ICC has jurisdiction with respect to a specified set of crimes, committed after the entry into force of the Statute, on the territory or by a national of a State for which the Rome Statute has entered into force (Rome Statute, articles 5, 11 and 12). A State which is not a party to the Statute may, nonetheless, accept the Court's jurisdiction with respect to the crime in question (Rome Statute, article 12(3); Rule of Procedure, Rule 44). (Myanmar is not among the 102 States for which the Rome Statute was in force as at 1 November 2006.)
20. Of the specified crimes over which the ICC has jurisdiction under article 5 of its Statute, "crimes against humanity" appear most relevant in relation to the exaction of forced or compulsory labour in Myanmar. This type of crime, to which the Commission of Inquiry alluded,<sup>13</sup> is further defined in article 7 of the Statute of the ICC,<sup>14</sup> as explained below.

<sup>13</sup> Report of the Commission of Inquiry, paras. 204 and 538.

<sup>14</sup> For purposes of the Rome Statute, "crime against humanity" includes any of a series of specified "acts when committed as part of a widespread or systematic attack directed against any civilian

When exercised, ICC jurisdiction applies equally to all persons without any distinction based on official capacity.

**21.** *Activation of the ICC's jurisdiction.* Where one or more crimes within the jurisdiction of the ICC appear(s) to have been committed, it may exercise its jurisdiction:

- (a) upon referral to the Prosecutor by a State Party; or
- (b) upon referral to the Prosecutor by the United Nations Security Council acting under Chapter VII of the United Nations Charter;<sup>15</sup> or
- (c) when the Prosecutor has, following authorization of the Pre-Trial Chamber, initiated an investigation *proprio motu* (on his or her own motion) on the basis of information received by means of a communication from any source (Rome Statute, articles 13, 14 and 15).

**22.** While there are important procedural differences among the three avenues, in all instances the Prosecutor must first evaluate the information made available to him or her (see Rome Statute, article 53(1)). The Prosecutor will not initiate an investigation of any situation involving acts in the territory of a non-State party without that State's consent, unless the acts involve a national of a State party, or the referral has come from the United Nations Security Council.<sup>16</sup>

**23.** *Record relevant to elements of a crime under the Rome Statute in the context of forced labour practices in Myanmar.* It is not up to the ILO to initiate prosecutions under the Rome Statute. In the Prosecutor's own evaluation of information, however, reference to findings reached within the ILO would be relevant points of departure. In its special sitting on the situation in Myanmar in June 2006, the ILC found that "forced labour continued to be widespread, particularly by the army. This was underlined by current reports of extensive forced labour being used in the context of increased military activity".<sup>17</sup> Similarly, at its most recent session, the Committee of Experts on the Application of Conventions and Recommendations noted reports of instances of forced labour, including forced portering by the military, "human minesweeping", and patrolling and sentry duty.<sup>18</sup> These statements are consistent with earlier findings of the Commission of Inquiry.<sup>19</sup> Such descriptions indicate that individuals have been deprived of their liberty and subjected by

population, with knowledge of the attack: ... 7(1)(c) enslavement; ... (e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; ... (k) other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health." (article 7(1)). The term "attack directed against any civilian population" means "a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack" (article 7(2)(a)).

<sup>15</sup> See S./RES/1593(2005) referring to the situation in Darfur since 1 July 2002 to the ICC Prosecutor.

<sup>16</sup> On 29 September 2006, the Security Council considered, in a closed meeting, an item entitled "The situation in Myanmar". United Nations Security Council, Doc. S/PV.5526 (Resumed).

<sup>17</sup> *Provisional Record* No. 24, Part Three, International Labour Conference, 95th Session (Geneva, 2006).

<sup>18</sup> CEACR: Individual observation concerning the Forced Labour Convention, 1930 (No. 29) Myanmar, 2006, paras. 6, 21 and 25.

<sup>19</sup> Report of the Commission of Inquiry, 1998, *op. cit.*, in particular paras. 528-538.

the authorities to the exercise of powers attaching to the right of ownership over a person, which could involve the exaction of forced labour under slavery-like conditions or in circumstances of enslavement<sup>20</sup> or severe deprivation of physical liberty in violation of fundamental principles of international law.<sup>21</sup> There may also be indications pointing to the commission of other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.<sup>22</sup>

24. The pattern established over time, including by the Commission of Inquiry,<sup>23</sup> suggests a systematic course of conduct in the nature of a crime against humanity, since such acts have been committed multiple times, by military authorities or under military control, against the civilian population of Myanmar. The continuing lack of adequate compliance by Myanmar with certain of the recommendations of the Commission of Inquiry, together with the prosecution of individuals for lodging allegedly false complaints of forced labour, may point to a state policy to commit, and permit the commission of, such acts.<sup>24</sup>
25. If investigations were to be initiated under the Rome Statute (i.e. with the consent of Myanmar, or where a national of a State party to the Rome Statute is involved, or upon referral by the United Nations Security Council), it must be stressed that the crimes alleged would need to be proven with reference to acts committed by a particular individual or individuals, who would be entitled to mount a defence. The Rome Statute contains numerous procedural requirements and safeguards, including general principles of criminal law (see especially articles 22-33 and 66-67) and evidentiary standards.
26. *Remedies/penalties.* Upon conviction of a crime referred to in the Rome Statute, an individual may be subject to specified remedies. The ICC may impose imprisonment for a specific term of up to 30 years or, when justified by the extreme gravity of the crime and the individual circumstances, imprisonment for life. In addition, the ICC may order the (payment of) a fine, and a forfeiture of proceeds, property or assets derived directly or indirectly from the crime may be ordered (Rome Statute, article 77). The Rome Statute also provides for measures to provide reparations, including restitution, compensation and rehabilitation, to victims or on their behalf (articles 75, 93(1) and 109). While such measures are not necessarily part of the criminal procedures described in this document,

<sup>20</sup> “Enslavement” is specifically referred to in the Rome Statute – see article 7(c). See also the reference to enslavement in the Commission of Inquiry report, para. 543.

<sup>21</sup> Rome Statute, article 7(e).

<sup>22</sup> Rome Statute, article 7(k).

<sup>23</sup> See report of the Commission of Inquiry (1998) and subsequent observations of the Committee of Experts and of the Committee on the Application of Standards, reviewing, inter alia, reports of the ILO Liaison Officer and statements of the Government of Myanmar made to the ILO.

<sup>24</sup> The elements of crime, incorporated by reference into the Rome Statute (article 9), explain that the wording “attack directed against a civilian population” is understood to mean a course of conduct involving the multiple commission of acts referred to in article 7(1) of the Statute against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack. The acts need not constitute a military attack. See United Nations doc. ICC/ASP/1/3, para. 3 under article 7 elements.



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they concern related remedies to provide redress for harm done to victims which would complement any criminal penalties imposed.<sup>25</sup>

## **B. Exercise by a State of its national criminal jurisdiction to prosecute those responsible for crimes committed outside its jurisdiction**

27. Article 25 of Convention No. 29 provides that, “the illegal exaction of forced or compulsory labour shall be punishable as a penal offence ...”. This implies that such acts, committed in the territory of any State for which this Convention is in force, would constitute a crime in national law. (Convention No. 29 has been ratified by 170 member States.)
28. Under general international law, States may punish foreign nationals in accordance with their domestic law and international jurisdictional principles for particular crimes that are regarded as the most serious by the international community (no matter where the crime was committed, or what the nationality of the accused or of the victim). This principle is well accepted in the case of piracy and has become increasingly recognized in relation to crimes against humanity, which include enslavement and other potentially relevant elements (see paragraphs 24-25 above).
29. Any State which obtains custody of persons suspected of responsibility for crimes of this type may choose to exercise its criminal jurisdiction within the limits permitted under international law, in accordance with internationally recognized procedural guarantees and subject to its own domestic legal system. The penalties/remedies which would apply in case of a judgement in relation to particular crimes would be defined by the domestic legal system.<sup>26</sup>
30. At the same time, the national court would need to review any claims of immunity from jurisdiction that government officials accused would likely make. In any event, the State having custody may wish to offer Myanmar the opportunity to itself act upon the charges concerned, under conditions of full prosecutorial and judicial independence.

## **C. Establishment of an ad hoc tribunal**

31. Another avenue which might be pursued would be the establishment, by the international community and in agreement with the State concerned, of an ad hoc tribunal for purposes of prosecuting individuals, including government officials, for acts involving forced or compulsory labour as described above. Like the ICC, such arrangements usually involve non-recognition of immunity for anyone against whom an indictment is brought. A recent example is the Special Court for Sierra Leone, before which acts of forced labour in the nature of enslavement have been included in the indictment of Charles Taylor as an element of the count of crimes against humanity. This Court was established by an

<sup>25</sup> See, in general, UNGA Res. 60/147 (16 Dec. 2005), Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of International Human Rights Law and Serious Violations of International Humanitarian Law.

<sup>26</sup> The effect given to international law in domestic legal systems varies.

Agreement between the United Nations and Sierra Leone, pursuant to Security Council Resolution 1315 (2000).<sup>27</sup>

- 32.** The Governing Body may wish to discuss the issues raised in this document, together with document GB.297/8/1, as a basis for taking any steps it may deem appropriate and for providing further guidance to the Office.

Geneva, 6 November 2006.

*Submitted for debate and guidance.*

<sup>27</sup> See [www.sc-sl.org](http://www.sc-sl.org). Case No. SCL-03-I, The Prosecutor against Charles Gharkay Taylor, Indictment, Count 12.