



## **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**

### **I. Background to the present report**

1. At its 295th Session (March 2006), the Governing Body decided to place the following item on the agenda of the 95th Session of the Conference: "To review what further action 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."
2. For that purpose, the Governing Body instructed the Office to prepare an analysis of all relevant options that the Conference could consider taking to ensure compliance with the Convention or to draw in any other appropriate way the consequences of the situation. In the course of the discussion in the Governing Body, a number of specific proposals concerning possible action were made. It was understood that the Office would take these into consideration in preparing its analysis of the options.<sup>1</sup>
3. Before presenting this analysis, it is necessary to briefly recall the history of developments in this case.

<sup>1</sup> The text of the conclusions adopted by the Governing Body is reproduced in Appendix I.

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## II. Brief history of developments <sup>2</sup>

4. Following a complaint in June 1996 under article 26 of the Constitution, a Commission of Inquiry was established in 1997 to examine the observance by the Government of Myanmar of the Forced Labour Convention, 1930 (No. 29). The authorities did not permit the Commission of Inquiry to visit Myanmar, and the Commission therefore had to take testimony in neighbouring countries from refugees and others who had recently left Myanmar. In its report issued in July 1998, the Commission of Inquiry found that the Convention had been violated in law, as well as in practice, in a widespread and systematic manner. It made the following recommendations:

In view of the Government's flagrant and persistent failure to comply with the Convention, the Commission urges the Government to take the necessary steps to ensure:

- (a) that the relevant legislative texts, in particular the Village Act and the Towns Act, be brought into line with the Forced Labour Convention, 1930 (No. 29) as already requested by the Committee of Experts on the Application of Conventions and Recommendations and promised by the Government for over 30 years, and again announced in the Government's observations on the complaint. This should be done without further delay and completed at the very latest by 1 May 1999;
  - (b) that in actual practice, no more forced or compulsory labour be imposed by the authorities, in particular the military. This is all the more important since the powers to impose compulsory labour appear to be taken for granted, without any reference to the Village Act or Towns Act. Thus, besides amending the legislation, concrete action needs to be taken immediately for each and every of the many fields of forced labour examined in Chapters 12 and 13 [of the Commission of Inquiry report] to stop the present practice. This must not be done by secret directives, which are against the rule of law and have been ineffective, but through public acts of the Executive promulgated and made known to all levels of the military and to the whole population. Also, action must not be limited to the issue of wage payment; it must ensure that nobody is compelled to work against his or her will. Nonetheless, the budgeting of adequate means to hire free wage labour for the public activities which are today based on forced and unpaid labour is also required;
  - (c) that the penalties which may be imposed under section 374 of the Penal Code for the exaction of forced or compulsory labour be strictly enforced, in conformity with Article 25 of the Convention. This requires thorough investigation, prosecution and adequate punishment of those found guilty. As pointed out in 1994 by the Governing Body committee set up to consider the representation made by the ICFTU under article 24 of the ILO Constitution, alleging non-observance by Myanmar of the Forced Labour Convention, 1930 (No. 29), the penal prosecution of those resorting to coercion appeared all the more important since the blurring of the borderline between compulsory and voluntary labour, recurrent throughout the Government's statements to the committee, was all the more likely to occur in actual recruitment by local or military officials. The power to impose compulsory labour will not cease to be taken for granted unless those used to exercising it are actually brought to face criminal responsibility.
5. The ensuing response of the Government was mainly limited to issuing an order (Order 1/99 of May 1999) temporarily suspending the power to requisition labour under the Village and Towns Acts. However, this was considered by the Committee of Experts and the Committee on the Application of Standards of the Conference to be only a partial

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<sup>2</sup> See also GB.291/5/2 (November 2004) and International Labour Conference, Report of the Committee on the Application of Standards, *Provisional Record* No. 22, Part 3.

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measure which had no concrete impact on the practice of forced labour.<sup>3</sup> In view of the Government's failure to take the necessary action to implement the recommendations of the Commission of Inquiry, the International Labour Conference adopted at its 87th Session (June 1999) a resolution on the widespread use of forced labour in Myanmar which resolved:

- (a) that the attitude and behaviour of the Government of Myanmar are grossly incompatible with the conditions and principles governing membership of the Organization;
- (b) that the Government of Myanmar should cease to benefit from any technical cooperation or assistance from the ILO, except for the purpose of direct assistance to implement immediately the recommendations of the Commission of Inquiry, until such time as it has implemented the said recommendations;
- (c) that the Government of Myanmar should henceforth not receive any invitation to attend meetings, symposia and seminars organized by the ILO, except such meetings that have the sole purpose of securing immediate and full compliance with the said recommendations, until such time as it has implemented the recommendations of the Commission of Inquiry.

6. Subsequently, at its 88th Session (June 2000) the International Labour Conference adopted a resolution under article 33 of the Constitution on measures to secure the compliance of Myanmar with the recommendations of the Commission of Inquiry. This resolution approved the following measures, which took effect on 30 November 2000:

- (a) to decide that the question of the implementation of the Commission of Inquiry's recommendations and of the application of Convention No. 29 by Myanmar should be discussed at future sessions of the International Labour Conference, at a sitting of the Committee on the Application of Standards specially set aside for the purpose, so long as this Member has not been shown to have fulfilled its obligations;
- (b) to recommend to the Organization's constituents as a whole – governments, employers and workers – that they: (i) review, in the light of the conclusions of the Commission of Inquiry, the relations that they may have with the member State concerned and take appropriate measures to ensure that the said Member cannot take advantage of such relations to perpetuate or extend the system of forced or compulsory labour referred to by the Commission of Inquiry, and to contribute as far as possible to the implementation of its recommendations; and (ii) report back in due course and at appropriate intervals to the Governing Body;
- (c) as regards international organizations, to invite the Director-General: (i) to inform the international organizations referred to in article 12, paragraph 1, of the Constitution of the Member's failure to comply; (ii) to call on the relevant bodies of these organizations to reconsider, within their terms of reference and in the light of the conclusions of the Commission of Inquiry, any cooperation they may be engaged in with the Member concerned and, if appropriate, to cease as soon as possible any activity that could have the effect of directly or indirectly abetting the practice of forced or compulsory labour;
- (d) regarding the United Nations specifically, to invite the Director-General to request the Economic and Social Council (ECOSOC) to place an item on the agenda of its July 2001 session concerning the failure of Myanmar to implement the recommendations contained in the report of the Commission of Inquiry and seeking the adoption of recommendations directed by ECOSOC or by the General Assembly, or by both, to governments and to

<sup>3</sup> See "Report of the Committee on the Application of Standards", Part One, General Report, International Labour Conference, 87th Session (Geneva, 1999); *Provisional Record* No. 23, para. 195; and Report III (Part 1A), *Report of the Committee of Experts on the Application of Conventions and Recommendations*, International Labour Conference, 88th Session (Geneva, 2000), p. 106 ff.

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other specialized agencies and including requests similar to those proposed in paragraphs (b) and (c) above;

- (e) to invite the Director-General to submit to the Governing Body, in the appropriate manner and at suitable intervals, a periodic report on the outcome of the measures set out in paragraphs (c) and (d) above, and to inform the international organizations concerned of any developments in the implementation by Myanmar of the recommendations of the Commission of Inquiry.

7. In parallel to these developments, an exchange of correspondence between the Director-General and the Myanmar authorities led to two ILO technical cooperation missions visiting Yangon, in May and October 2000, to provide assistance to the authorities for the immediate implementation of the recommendations of the Commission of Inquiry. These missions resulted in the adoption of an additional order supplementing Order 1/99, which for the first time prohibited forced labour in reasonably clear terms, covering all authorities including the army.
8. In accordance with the 2000 resolution, the Director-General wrote to member States in December 2000, and through them to employers' and workers' organizations, bringing their attention to the relevant paragraph of the resolution and requesting that they inform him of any action taken or envisaged in this regard. In accordance with the resolution, the Director-General also wrote to international organizations, as well as setting in motion the procedures necessary to have the matter placed on the agenda of the July 2001 session of the United Nations Economic and Social Council (ECOSOC).
9. The initial responses received by the Director-General were summarized in an interim report to the March 2001 session of the Governing Body (GB.280/6). The replies from the Organization's constituents indicated that in general they had adopted what was then described as a "wait-and-see" approach, in the light of the ongoing dialogue which had in the meantime been developing between the ILO and the Myanmar authorities and which seemed to have the potential of achieving positive results. At this time agreement was reached on the visit to Myanmar in September and October 2001 of a High-Level Team (HLT) appointed by the ILO to assess in full independence and freedom of movement the realities of the forced labour situation. The findings and recommendations of the HLT in turn led to the appointment of an ILO Liaison Officer in Myanmar in May 2002, and in May 2003 to agreement on a joint Plan of Action to address forced labour, including in particular the establishment of a facilitator mechanism to address specific complaints regarding forced labour. Each of these steps were key recommendations of the HLT.
10. However, around the time of the finalization of the draft Plan of Action in May 2003, the momentum in the process of dialogue and cooperation slowed in part due to uncertainties following the Government's action against the National League for Democracy (NLD). It did not prove possible to go ahead with the implementation of the Plan, and there were increasingly calls to return to the application of the measures adopted under the 2000 resolution.<sup>4</sup> The hopes of proceeding with the Plan were further dashed in March 2004 when a court case, in which three people had been sentenced to death for high treason, including on the basis of alleged contacts and cooperation with the ILO, was brought to the attention of the Office.
11. In the conclusions adopted at the end of its special sitting in June 2005, the Committee on the Application of Standards of the International Labour Conference inter alia indicated that:

<sup>4</sup> See International Labour Conference, 91st Session (Geneva, 2003), *Provisional Record* No. 24, Part Three, p. 10.

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... In the view of the Committee, recent developments had further confirmed the conclusions of the Governing Body at its March 2005 session that the “wait-and-see” attitude that prevailed among most members since 2001 had lost its *raison d’être* and could not continue. The Committee’s general view was that Governments, Employers and Workers, as well as other international organizations, should now activate and intensify the review of their relations with Myanmar that they were called upon to make under the 2000 resolution, and to urgently take the appropriate actions, including as regards foreign direct investment in all its various forms, and relations with state- or military-owned enterprises in Myanmar. In accordance with the conclusions of the Governing Body in March, the present conclusions should be transmitted to all those to whom the 2000 resolution was addressed. The results of such reviews should be fully reported to the Director-General so that the Governing Body could have a complete picture in November. As regards the Economic and Social Council (ECOSOC), it should be requested to reactivate its consideration of the item placed on its agenda in 2001 in this regard, and Members in ECOSOC should be ready to support such a move ...<sup>5</sup>

12. A report on further action taken by constituents under the 2000 resolution was provided to the Governing Body at its November 2005 session (see GB.294/6/1). Also presented to the Governing Body at that time was information on a number of developments of concern: between June and August a series of mass rallies were held in Myanmar involving official and semi-official organizations, at which officials of these organizations were highly critical of the ILO; in August and September, in what was described as an “orchestrated” campaign of intimidation, the ILO Liaison Officer in Myanmar received a series of letters threatening him with death unless he left the country;<sup>6</sup> and in October the Myanmar authorities indicated verbally to an ILO mission that they intended to withdraw from the Organization (subsequently, the Myanmar authorities have indicated that they no longer intend to take such a step).
13. Moreover, as noted in the report presented to the Governing Body in March 2006 (GB.295/7), ECOSOC considered the Director-General’s request at its first organizational session held in January 2006, and it is foreseen that ECOSOC will discuss this matter at its substantive session in July 2006 under item 14b of its agenda. In addition, the United Nations General Assembly adopted a significant resolution (A/RES/60/233) on the situation of human rights in Myanmar in December 2005, which due to its date of official publication on 23 March 2006<sup>7</sup> could not be part of the information considered by the Governing Body at its 295th Session.

### **III. Analysis of the relevant options**

#### **Introduction**

14. The mandate contained in the conclusions adopted by the Governing Body at its March 2006 session is in essence to review what can be done to more effectively ensure Myanmar’s compliance with the conclusions of the Commission of Inquiry and to address

<sup>5</sup> See International Labour Conference, 93rd Session (Geneva, 2005), *Provisional Record* No. 22, Part Three.

<sup>6</sup> The incompatibility of this situation with obligations under the ILO Constitution was brought to the attention of the Government.

<sup>7</sup> Relevant parts are reproduced in Appendix II.

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the new issue of prosecutions and threats of prosecutions in relation to persons accused of making “false allegations” of forced labour.

15. In order to discharge this mandate it is important to understand the extent of what has been achieved under the 2000 resolution as well as the limits inherent in the current framework. The various developments that have taken place were set out in the previous section, but it is perhaps worth adding here the following observations.
16. The implementation of article 33 of the Constitution through the 2000 resolution initially had a rather remarkable impact. In the political context which prevailed at the time, it led the Myanmar authorities – or at least those among them who were more open to engagement with the international community – to conclude that cooperation with the ILO was the best option. Progress was achieved as a result: the issuance of orders prohibiting forced labour; an end to large-scale imposition of forced labour on national infrastructure projects; the unprecedented visit of a High-Level Team in 2001 to carry out an objective assessment of the realities of forced labour; and the implementation of the High-Level Team’s recommendations, which included the establishment of an ILO presence and the development of a Plan of Action – unfortunately never implemented – to address forced labour and provide a means of recourse for victims through a facilitator mechanism.
17. A fundamental shift took place in 2004 as a result of domestic political circumstances. Some advance indication of a possible shift came in early 2004 when it became known that three people had been sentenced to death for high treason because of alleged contacts with the ILO. Towards the end of that year, Prime Minister Khin Nyunt and the other main interlocutors of the ILO, including the Minister for Labour, were removed from their posts. While the authorities at first claimed that the failure to implement the Plan of Action resulted from the approach taken by the ILO since 2003,<sup>8</sup> it soon became clear that there had been a radical change in attitude on the part of the Myanmar leadership. This was evident from the treatment of a “very High-Level Team” which visited Yangon in February 2005. The team was disturbed by the “eloquent silence” of its interlocutors on a number of fundamental questions (including the prospects of proceeding with the Plan of Action), and then had to cut short its visit when it failed to secure meetings at a sufficiently high level. The change in attitude on the part of the authorities was further demonstrated later in 2005 by the confrontational stance adopted towards the ILO and the death threats against the Liaison Officer, as well as by the implementation of a policy to prosecute those involved in making “false allegations” of forced labour. This change in attitude was also clear from the fact that the authorities once again began claiming that there was no significant forced labour problem in the country, in contradiction with their acceptance in the preceding few years that this was a serious problem which needed to be addressed. In essence, they have now reverted to a position similar to that which they adopted in the 1990s, in particular at the time of the Commission of Inquiry.<sup>9</sup>
18. It seems clear, as a matter of common sense and experience, that the effective elimination of forced labour in Myanmar cannot be achieved without the cooperation of the authorities. And as was pointed out by the High-Level Team, such cooperation is indeed in the interest

<sup>8</sup> See International Labour Conference, 91st Session (Geneva, 2003), *Provisional Record* No. 24, Part Three.

<sup>9</sup> The reports of the Liaison Officer to the Governing Body and to the Committee on the Application of Standards since 2002 indicate that the problem of forced labour remains serious, in particular as regards the army. This issue is once again highlighted by serious allegations that villagers are currently being subjected to forced labour in the context of military operations in northern Kayah State.

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of the country and is indispensable for its modernization. For its part, the ILO has always been consistent in its willingness to continue that cooperation. In light of the change of attitude by the authorities, however, it is necessary in the context of the present review by the International Labour Conference to examine three aspects:

- (i) the discontinuation of prosecutions of complainants as a condition to continuing cooperation;
- (ii) possible modalities for resuming good faith cooperation;
- (iii) the consequences of a continued refusal to cooperate under the necessary conditions.

### **The discontinuation of prosecutions of complainants as a condition to continuing cooperation**

19. The policy to prosecute persons involved in making “false allegations” of forced labour has been stated and unambiguously reaffirmed by the authorities. Indeed, a number of persons are being prosecuted or have already been sentenced and imprisoned on this basis. The authorities cannot continue such a policy while at the same time pledging their continued cooperation with the ILO. The reasons why these two positions are radically incompatible, and how this obstacle to cooperation could be removed, are examined below.

#### ***Why the threat to prosecute is incompatible with the stated intention to cooperate***

20. The main reason for the incompatibility of these two positions is to be found in the report of the High-Level Team of 2001. In that report it is pointed out that even though Myanmar legislation could be considered to be in conformity with the Convention, this has not translated into a significant change in actual practice. The reason is that victims are afraid of being further victimized if they lodge complaints, due to the absence of an independent judiciary, compounded by a lack of freedom of association. This is why the High-Level Team recommended the establishment of an ILO presence to give more confidence to the victims of forced labour and the establishment of a form of ombudsman (or facilitator).
21. The ILO presence did achieve some success in giving confidence to victims and witnesses of forced labour (the Liaison Officer received 80 separate complaints in 2004). These successes were however abruptly reversed by various developments, which seemed to be intended to discourage the ILO presence and to make it ineffective: i.e. the “orchestrated” death threats to the ILO Liaison Officer; and then the authorities’ threats and actual steps to prosecute the complainants considered to be making “false allegations” of forced labour, which indeed resulted in the ILO instructing the Liaison Officer not to entertain any further complaints (to avoid placing complainants in jeopardy).
22. As these considerations demonstrate, the threat to prosecute complainants contradicts the very *raison d’être* of the ILO presence, and therefore contravenes the understanding between Myanmar and the ILO on establishing the presence. In a context where the question of whether an allegation is false is decided by government authorities themselves or by a judiciary which is in no way independent, the practice is also in contradiction with the obligations of Myanmar under the specific provisions of Convention No. 29. It deprives victims of a system under which complaints will be examined on their merits (as required by Article 23 of the Convention), and makes it practically impossible for any penalties imposed by law for illegal imposition of forced labour to be “really adequate and strictly enforced” (as required by Article 25 of the Convention).

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23. This makes clear that Myanmar's insistence on its sovereign right to apply its criminal legislation against possible abuse by those who lodge politically motivated complaints is disingenuous. The sovereignty issue was not raised when the understanding on ILO presence and Plan of Action including the facilitator mechanism were negotiated. Indeed, any legitimate concern the authorities may have to deter possible abuses from ill-motivated complainants would be taken care of by the establishment of either of the two objective mechanisms which have been considered so far.

### ***How this obstacle to continued cooperation could be removed***

24. It is to be hoped that the Myanmar authorities will change their position on the prosecution of complainants prior to the International Labour Conference. Otherwise, judicial options exist which can establish whether the threat and use of legal action against persons lodging allegedly "false complaints" of forced labour is consistent with giving effect to Convention No. 29,<sup>10</sup> when such determination is not made through a process or organ offering the necessary standards of independence. Three main options may be identified:

- *Option 1: A binding ruling by the International Court of Justice (ICJ) under article 37(1) of the Constitution.*<sup>11</sup> Reading this provision as a compromissory clause,<sup>12</sup> it enables Members to obtain a ruling in case of a dispute over interpretation of a Convention. Although it cannot be taken for granted that, in the framework of such an interpretation, the Court could order Myanmar to stop the prosecution of complainants,<sup>13</sup> any ruling would be binding and the judgement could be enforceable through the United Nations Security Council. This solution would not require a formal decision by the International Labour Conference and could be initiated by a Member at any time. In such a scenario, the result may depend on the framing of the issue and the argumentation presented by a Member or group of Members. While a Member would bring the case to the ICJ, it would be free to seek the legal assistance of the Office. Under the ICJ rules, the Court could invite the ILO to make a submission on the case, and the ILO could submit information on its own initiative.
- *Option 2: A decision through the establishment by the ILO of a tribunal under article 37(2) of the Constitution.* A second option would be to establish an independent tribunal under article 37(2) of the Constitution "for the expeditious determination of any dispute or question relating to the interpretation of a Convention".<sup>14</sup> While the ILO would have full control to manage its own interests in

<sup>10</sup> Without prejudice, that is, to the obligations set out under the Understanding between the ILO and Myanmar establishing the ILO presence itself.

<sup>11</sup> For the full text of article 37(1) of the Constitution, see Appendix III.

<sup>12</sup> S. Rosenne, *The Law and Practice of the International Court, 1920-2005*, 4th ed., Vol. I, Martinus Nijhoff Publishers (Leiden/Boston), pp. 153-157. Ago also suggested that this provision could also be read as laying the jurisdictional basis for a binding advisory opinion (R. Ago, "Binding" advisory opinions of the International Court of Justice", in *American Journal of International Law*, Vol. 85, No. 3, July 1991, pp. 439-451). It would obviously be for the Court itself to settle the matter when it is brought before it, unless preliminary clarification of the scope of Art. 37(1) was sought through a request for an advisory opinion.

<sup>13</sup> It is even less certain that the Court could order provisional measures within such a framework.

<sup>14</sup> For the full text of article 37(2) of the ILO Constitution, see Appendix III.

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this case, it should be taken into account that, by its very nature, such a tribunal established on a purely ad hoc basis would require substantial time and involve substantial cost. Moreover, although any ruling would be binding, this option may not provide significant additional leverage since it would have to be enforced through ILO procedures, including article 33, which up to now have not, on their own, yielded the intended results. Since the Governing Body would need to submit rules providing for the appointment of such a tribunal to the Conference,<sup>15</sup> such a tribunal could be established at the earliest in June 2007.

- *Option 3: An advisory opinion from the International Court of Justice.* A third option would be for the ILO to exercise its undisputed right to request an advisory opinion of the International Court of Justice under the United Nations Charter and the Agreement between the United Nations and the ILO.<sup>16</sup> While an advisory opinion is not binding, it carries juridical weight. In contrast to option 1, a formal decision by the Governing Body, which could be taken at the earliest at its November 2006 session, would be a precondition for the ILO to seek an advisory opinion. Requests for advisory opinions do not enter the queue of contentious cases before the Court, and are therefore dealt with more quickly.

25. These three options are not necessarily mutually exclusive. The choice will obviously depend in part on the attitude that the Myanmar authorities display. It might thus be envisaged that the International Labour Conference could first, through its conclusions, recognize that its Members may legitimately consider initiating proceedings under article 37(1) (option 1) – possibly in the context of the “review” they are requested to carry out under the 2000 resolution. Depending on whether or not such proceedings are initiated, the Governing Body could then request an advisory opinion (option 3) or consider proceeding in accordance with article 37(2) (option 2). At the same time, additional substantive steps under the 2000 resolution, as outlined below in paragraph 34, could be pursued.

### **Possible modalities for resuming good faith cooperation**

26. It has already been made clear why the discontinuation of Myanmar’s policy of prosecuting complainants is a basic condition for resuming good faith cooperation. If the Myanmar authorities are ready to discontinue this policy, however, then the modalities for continuing cooperation have already been examined in detail between the two sides, in particular during the ILO mission to Yangon in March 2006 (see GB.295/7). It is perhaps worth briefly recalling the two options that have been proposed, but which have been rejected by the authorities in all recent discussions.
27. Of the two options, the establishment of a Joint Panel to address complaints of forced labour on a confidential basis remains the best solution in the view of the Office. By having one member of the Panel appointed by each party (with provision for a third independent member), it would place the two on an equal footing. The confidentiality and credibility of the system would, as noted above, effectively address the concern of the authorities that false complaints of forced labour might be lodged for political motives. To address any reservations that the authorities may still have over this proposal, the system

<sup>15</sup> At its May 1993 session, the Governing Body reviewed various aspects involved in establishing a tribunal under article 37(2) of the ILO Constitution (GB.256/SC/2/2).

<sup>16</sup> For the full text of the relevant provision in the UN-ILO Agreement see Appendix III.

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could be established on a time-bound experimental basis, as suggested by the mission in March 2006.

28. The other option which was proposed, that of strengthening the capacity of the Liaison Officer to be able to deal with complaints, could also be explored further, provided that satisfactory modalities can be worked out. This would require, in addition to resolving the issue of prosecutions, agreement on a number of relevant issues (which were also discussed in detail between the ILO and the Government during the mission). There would need to be sufficient legal guarantees and protection for complainants and their representatives in order to give victims confidence to make use of the system. It would also require a strengthening of the Liaison Office, including the appointment of a second international staff member. And, as regards facilities, the Liaison Officer and his staff would have to have the freedom of movement and contacts necessary for him to be able to establish whether a complaint represented a *prima facie* case.
29. In this context it is worth recalling the very positive role that some neighbouring countries, and the region as a whole (e.g. through Association of South East Asian Nations (ASEAN) mechanisms), have been playing in convincing Myanmar to continue cooperation with the ILO. Such efforts could be particularly vital at this juncture in persuading the authorities that the best way to demonstrate a willingness to cooperate with the ILO would be to accept – on an experimental basis – a credible mechanism for dealing with complaints of forced labour together with a moratorium on prosecuting complainants.

### **The consequences of a continued refusal to cooperate under the necessary conditions**

30. As indicated above, the main test of the willingness on the part of the authorities to resume good faith cooperation will be the discontinuation of their policy to prosecute complainants. If they maintain this threat (and indeed continue to implement it), then they should in fact no longer claim that they are cooperating with the ILO, as this is manifestly not the case. It would then be up to the Government of Myanmar to draw the logical consequences of such a stance.
31. In this context it should be recalled that, under the 1998 Declaration on Fundamental Principles and Rights at Work, the elimination of all forms of forced or compulsory labour is an obligation inherent in membership of the ILO. It was on this basis that the International Labour Conference resolved in 1999 that the attitude and behaviour of the Government of Myanmar was “grossly incompatible with the conditions and principles governing membership of the Organization”.<sup>17</sup>
32. If the Myanmar authorities refrain from drawing the logical consequences of their position, it will be for the ILO itself to do so – it being recalled, however, that there is no provision in the ILO Constitution for the expulsion or suspension of a Member.<sup>18</sup> The first point which must be addressed is whether the ILO can increase the pressure in such a way as to

<sup>17</sup> See International Labour Conference, 87th Session (Geneva, 1999), resolution on the widespread use of forced labour in Myanmar.

<sup>18</sup> The question of amending the Constitution to make provision for such a step was contemplated by the International Labour Conference in 1964 in the context of the apartheid regime in South Africa. Two constitutional amendments concerning suspension from membership or expulsion of a Member adopted at that time have not entered into force. This does not necessarily mean that there are no other ways based on general treaty law that could be explored.

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lead the authorities to adopt a more constructive attitude to permit tackling the forced labour problem seriously. While this involves a matter of political judgement, it may be recalled that the political context today seems quite different from that which prevailed in 2000, when the implementation of article 33 strengthened the position of those members of the Myanmar leadership who considered that the path of cooperation was the best one to take.

33. The second point is that even if it seems unlikely that ILO action can bring about a change in Myanmar's approach and attitude, the objective of the International Labour Conference in reviewing options should at least be that the authorities do not derive any moral, political or other benefit from their refusal to cooperate. Given that there is limited scope for the Organization itself to take action, the onus for ensuring this must be on the Members. In this regard there is a considerable range of possible steps which could be considered from a substantive and procedural viewpoint.

### **Substantive steps**

34. One conceivable substantive step would of course be to supplement the 2000 resolution by giving it a more mandatory character in terms of outcome rather than simply in terms of process. It must however be recognized that those Members who have so far been reluctant to take concrete steps under the 2000 resolution would be most unlikely to support any new resolution requiring them to do so. Aside from this possibility, the following steps might be considered:

- As regards member States, the existing measures contained in the 2000 resolution are already very broad in scope, giving them wide latitude to determine the “appropriate measures” to be taken. Enhanced application of the measures could perhaps be achieved by providing more precise indications as regards the kinds of concrete steps by member States which could be most effective, and which would be most directly relevant to the sectors and types of enterprise in which forced labour appears to be currently employed. Indeed, some steps were already taken in this direction at the Conference last year, when the Committee on the Application of Standards made reference in its conclusions to action by Members with regard to foreign direct investment and relations with state- or military-owned enterprises in Myanmar. Such indications and guidance could be exemplified with examples of concrete action taken to date. It must be underlined, however, that unless such measures are closely coordinated – in particular with countries in the region – they could prove futile or even counterproductive.
- Employers' and workers' organizations could be encouraged to have a more active involvement in the implementation of the measures adopted in 2000 (which were in practice addressed primarily to member States), and to provide information in this regard to the ILO. This could include specific action by foreign enterprises to ensure that forced labour is not utilized in activities in which they may be directly or indirectly involved in Myanmar. International and national workers' organizations, together with non-governmental organizations and civil society networks, have organized boycott and pressure campaigns (as well as shareholder action) against companies doing business in Myanmar, using as a basis the 2000 resolution.<sup>19</sup> In

<sup>19</sup> For example, the International Confederation of Free Trade Unions has called for, among other action, the European Union to ban imports, investment, export credits and financial transfers in relation to Myanmar. The ICFTU lists companies it has identified as doing business with Myanmar. See <http://www.icftu.org/list.asp?Type=ALL&Order=Date&Language=EN&STEXT=burma>. In

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addition, pension funds concerned with ethical or socially responsible investments have also had an influence in some cases on decisions by companies to leave Myanmar.

- Consideration could be given to convening multi-stakeholder conferences, which would require external funding, to exchange ideas of “best practice” of action taken in implementation of the 2000 resolution and related developments.
- In terms of reporting, more detailed guidance on possible action could be supplemented by a request for a further round of reports, this time under the authority of the Conference itself rather than the Governing Body. This would underline the urgency of taking action, and responses would be examined by the Conference in 2007.
- As regards other international organizations, the approach adopted through the 2000 resolution was to endeavour to promote awareness and foster a consistent attitude among such organizations as regards forced labour in Myanmar. In this regard, the provision in operative paragraph 1(c) of the 2000 resolution, which was cited in the Director-General’s letter of 8 December 2000 to international organizations, was for the matter to be discussed in the “relevant bodies” of these organizations – that is, each organization’s governing board or equivalent. In fact, however, the responses received indicated that, virtually without exception, the matter had been considered at the secretariat level only. The Conference might reaffirm the call to international organizations to specifically examine the possible forced labour aspects of their relations with Myanmar and the relevant responses to be taken in particular at the level of their governing organs.<sup>20</sup>
- Some Members have raised the possibility of referring the matter to the United Nations Security Council directly. While this had been researched some time ago, it continues to seem very unlikely that a possibility would exist for a direct referral by the ILO, for the reasons that were indicated when the ILO sought legal advice from the UN on the issue. A more clearly defined route to the Security Council would be through an inter-state case before the International Court of Justice (see option 1 above, and directly below), or by referral of the matter to the attention of the Security Council by any member State of the UN under its Charter.<sup>21</sup>
- Finally, as regards the specific (new) issue of prosecution against complainants, Members could be encouraged to initiate proceedings in the International Court of Justice with the assistance of the Office, as discussed above (subject, of course, to any change of attitude by the authorities on this issue during the Conference, such as their acceptance of a moratorium on prosecutions, withdrawal of pending charges, and release sentenced prisoners with expungement of any related criminal record).

addition, action to boycott goods imported from Myanmar has been considered by various trade unions in the transport sector.

<sup>20</sup> Ideas could also be solicited from organizations that have been involved in various procedures for awarding compensation to victims of forced labour in other contexts, to explore whether additional options might arise at a later stage in relation to Myanmar.

<sup>21</sup> Any UN Member may bring any dispute, or any situation, which might lead to international friction or give rise to a dispute, to the attention of the Security Council under article 35 of the UN Charter. It would be for the Security Council to recommend appropriate procedures or methods of adjustment (article 36, UN Charter).

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## **Procedural steps**

35. In a situation where actions imply a refusal on the part of the authorities to cooperate in good faith, the current way in which the Myanmar issue is dealt with procedurally within the ILO might have to be reviewed. In such a situation, there would be little point in having a review of developments three times a year, in both the Governing Body and at the International Labour Conference. The question would be how to address the realities of the situation of forced labour in Myanmar in the appropriate way, including by giving it greater visibility. This could perhaps be achieved by complementing the present review within the Committee on the Application of Standards with a new procedure comparable to the process initiated by the 1964 Declaration on Action against Apartheid. Between 1965 and 1993, action against apartheid in South Africa was discussed annually in, and recommendations presented by, a special committee of the Conference, which had a limited membership. This would be a particularly relevant option should Myanmar withdraw from the Organization or denounce Convention No. 29. The Governing Body would of course continue to be regularly updated on significant developments in the situation.
36. The steps outlined above, and any guidance that may be given by the Conference in this regard, would be without prejudice to other possible steps that Members might wish to take in relation to questions that go beyond the ILO mandate.<sup>22</sup>

## **IV. Concluding remarks**

37. The approach adopted by the ILO has been consistently to offer dialogue and cooperation. Indeed, it is only through cooperation with the authorities that progress on the elimination of forced labour can be achieved. So while the ILO has no option but to draw the consequences of non-cooperation – both in the hope that this can have an impact on the attitude of the authorities, as well as to ensure that they do not benefit from non-cooperation – the door for dialogue must remain open. The options set out in this paper are predicated on such an approach.
38. The ILO has also endeavoured to proceed wherever possible on the basis of consensus. This would seem all the more relevant in the present circumstances. In this regard, it should be noted that the options set out above do not require amendment of the 2000 resolution or the adoption of a new resolution. The steps outlined above could be achieved through the adoption of conclusions by the Conference to give guidance to the Director-General and the ILO constituents in the implementation of the 2000 resolution, and as regards the issue of prosecutions. Indeed, the 2000 resolution is a well-balanced solution, which has stood the test of time; it would be unwise to subject it to reformulation and revision unless this were absolutely required (which might be the case, for example, if the legal or factual context in which it was formulated were to change fundamentally).
39. The impact of the 2000 resolution has extended well beyond the ILO. In part, this reflects the shared concern of others, from the international community to local community groups, over the continued resort to forced labour in Myanmar and the prosecution of complainants. The current session of the Conference has the opportunity to adopt carefully considered conclusions which can serve as a basis for even greater impact.

<sup>22</sup> For example, there may be international legal consequences to be drawn from the statements of the Commission of Inquiry that imposition of forced labour, when committed in a widespread and systematic manner, is a crime against humanity for which those individuals who are responsible may be held accountable.

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## Appendix I

### Conclusions adopted by the Governing Body at its 295th Session under item 7 of its agenda

The Governing Body has considered all the information before it, including the comments of the Permanent Representative of Myanmar. The overwhelming reaction was one of profound concern at the continued lack of any meaningful progress in the situation.

In particular, the determination expressed by the Myanmar authorities to prosecute individuals involved in lodging “false allegations” represented a further deterioration in the situation which seriously undermined any prospect of progress, and was in direct contradiction with the conclusions adopted at the International Labour Conference in 2005. The Myanmar authorities should cease prosecuting such individuals and should release those already imprisoned for such activities, including Ma Su Su Nwe and U Aye Myint.

Under these circumstances, the Workers moved that, as previously envisaged in November 2005, an item should be placed on the agenda of the 95th Session of the International Labour Conference (May-June 2006) as follows: “To review what further action could be taken by the ILO in accordance with its Constitution in order: (i) to effectively secure Myanmar’s compliance with the recommendations of the Commission of Inquiry; and (ii) to ensure that no action is taken against complainants or their representatives.” For that purpose, the Office would be instructed to prepare an analysis of all relevant options which the International Labour Conference could consider taking to ensure compliance with the Convention or to draw in any other appropriate way the consequences of the situation.

This resolution, with an amendment made by the Employers to the Preamble, received the general support of the Employers and many Governments, and it can thus be considered that it has sufficient support to be adopted as amended. In the course of the discussion, a number of specific proposals concerning possible action were made. It was understood that the Office would take these into consideration in preparing its analysis of the options.

In the meantime, all remaining possibilities to resolve the issue should continue to be pursued.

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## Appendix II

### General Assembly resolution 60/233 on the situation of human rights in Myanmar (23 March 2006)

*The General Assembly,*

...

2. *Expresses grave concern at:*

...

- (h) The fact that the Government of Myanmar, as noted by the 2005 International Labour Conference, has still not implemented the recommendations of the International Labour Organization Commission of Inquiry, has yet to demonstrate its stated determination to eliminate forced labour and take the necessary measures to comply with the International Labour Organization Convention concerning Forced or Compulsory Labour, 1930 (Convention No. 29), and has yet to demonstrate commitment at the highest level to substantive policy dialogue that can address the forced labour problem;

...

3. *Strongly calls upon* the Government of Myanmar:

- (a) To end the systematic violations of human rights in Myanmar and to ensure full respect for all human rights and fundamental freedoms;
- (b) To end impunity and to investigate and bring to justice any perpetrators of human rights violations, including members of the military and other government agents in all circumstances;
- ...
- (j) To urgently resolve the serious issues identified by the very High-Level Team and the International Labour Conference, including to give clear assurances that no action will be taken against persons lodging complaints of forced labour, to resolve outstanding allegations of forced labour, to issue the necessary visas to allow a strengthening of the International Labour Organization presence in Myanmar, and to respect the freedom of movement of the Liaison Officer ad interim;
- (k) ... to ensure that ... no person cooperating with ... any international organization is subjected to any form of intimidation, harassment or punishment, and to review as a matter of urgency the cases of those currently undergoing punishment in this regard;

...

4. *Calls upon* the Government of Myanmar:

...

- (e) To fulfil its obligations to restore the independence of the judiciary and due process of law, and to take further steps to reform the system of the administration of justice;

5. *Requests* the Secretary-General:

...

- (c) To report to the General Assembly at its sixty-first session and to the Commission on Human Rights at its sixty-second session on the progress made in the implementation of the present resolution;

6. *Decides* to continue the consideration of the question at its sixty-first session.

69th plenary meeting  
23 December 2005

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## Appendix III

### Relevant legal provisions

#### **Constitution of the International Labour Organization**

##### ARTICLE 33

In the event of any Member failing to carry out within the time specified the recommendations, if any, contained in the report of the Commission of Inquiry, or in the decision of the International Court of Justice, as the case may be, the Governing Body may recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith.

##### ARTICLE 37

1. Any question or dispute relating to the interpretation of this Constitution or of any subsequent Convention concluded by the Members in pursuance of the provisions of this Constitution shall be referred for decision to the International Court of Justice.

2. Notwithstanding the provisions of paragraph 1 of this article the Governing Body may make and submit to the Conference for approval rules providing for the appointment of a tribunal for the expeditious determination of any dispute or question relating to the interpretation of a Convention which may be referred thereto by the Governing Body or in accordance with the terms of the Convention. Any applicable judgment or advisory opinion of the International Court of Justice shall be binding upon any tribunal established in virtue of this paragraph. Any award made by such a tribunal shall be circulated to the Members of the Organization and any observations which they may make thereon shall be brought before the Conference.

#### **Convention (No. 29) concerning forced labour, 1930**

##### ARTICLE 1

1. Each Member of the International Labour Organisation which ratifies this Convention undertakes to suppress the use of forced or compulsory labour in all its forms within the shortest possible period. ...

##### ARTICLE 23

1. To give effect to the provisions of this Convention the competent authority shall issue complete and precise regulations governing the use of forced or compulsory labour.

2. These regulations shall contain, inter alia, rules permitting any person from whom forced or compulsory labour is exacted to forward all complaints relative to the conditions of labour to the authorities and ensuring that such complaints will be examined and taken into consideration.

##### ARTICLE 25

The illegal exaction of forced or compulsory labour shall be punishable as a penal offence, and it shall be an obligation on any Member ratifying this Convention to ensure that the penalties imposed by law are really adequate and are strictly enforced.

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## **Agreement between the United Nations and the International Labour Organization**

### ARTICLE IX

#### *Relations with the International Court of Justice*

1. The International Labour Organisation agrees to furnish any information which may be requested by the International Court of Justice in pursuance of article 34 of the Statute of the Court.

2. The General Assembly authorises the International Labour Organisation to request advisory opinions of the International Court of Justice on legal questions arising within the scope of its activities other than questions concerning the mutual relationships of the Organisation and the United Nations or other specialised agencies.

3. Such request may be addressed to the Court by the Conference, or by the Governing Body acting in pursuance of an authorisation by the Conference.

4. When requesting the International Court of Justice to give an advisory opinion, the International Labour Organisation shall inform the Economic and Social Council of the request.