II. SEVENTY-FIFTH ANNIVERSARY OF THE ILO

THE STANDARD-SETTING ACTIVITIES OF THE INTERNATIONAL LABOUR ORGANIZATION: THE PRESENT AND THE FUTURE

1. Introduction

10. The 75th anniversary of the founding of the ILO will generate a wide-ranging discussion of the Organization's activities. The Committee of Experts on the Application of Conventions and Recommendations wishes to associate itself with the commemoration of the anniversary and to participate in the process of reflection afforded by this occasion. In this regard, the Committee has paid attention mainly to the possibilities of improving the application of international labour standards. In accordance with its mandate and in the broader interests of the activities of the ILO, the Committee has put forward, for examination, some suggestions on this matter.

11. As the Preamble of the ILO Constitution proclaims, universal and lasting peace can be established only if it is based on social justice. This principle, which is affirmed in the Declaration of Philadelphia, has always guided the action of the ILO. This same principle should be the basis for the policies of all member States, in conformity with the notion that "the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries". (Endnote 1)

12. The ILO was founded in 1919, chiefly for the purpose of framing international legislation in the social field. That objective was confirmed in 1944. Existing international labour Conventions and Recommendations cover virtually all aspects of labour law and social security law.

13. In ILO philosophy and practice, there can be no development of international labour law without effective supervision of its application. This explains why supervision of the application of standards is ranked among the most important of the ILO's activities. ILO procedures and supervisory bodies have played a pioneering role on the international scene and still serve as a point of reference for other international organizations.

14. The framing of standards and the supervision of their application are part of the essential activities of the ILO. Suffice to recall that the number of ratifications of international labour Conventions now stands at over 6,000. In the majority of cases, States observe the obligations contained in ratified Conventions. Moreover, over the last 30 years the supervisory bodies have registered more than 2,000 cases of progress - in other words, instances of
national legislation and practice being changed to meet the requirements of a ratified Convention, following comments by the supervisory bodies.

15. There have been radical changes on the international scene in recent years - the end of the Cold War, a revival of ethnic and national conflicts, growing structural unemployment in the most developed countries and structural adjustment programmes in a certain number of countries including developing countries are but a few examples. The ILO's standard-setting activities must keep pace with these changes so that the Organization can meet the challenges of the twenty-first century dynamically and effectively. The paragraphs that follow contain a brief description of the present situation and some food for thought on the future of standard-setting activities.

2. Framing and content of international labour standards

2.1 The present situation

16. The term "international labour standards" commonly refers to the international legal instruments drawn up by the International Labour Organization, in other words, the Conventions and Recommendations. The purpose of the Conventions is to establish substantive legal obligations for the member States of the ILO which ratify them. Ratification of international labour Conventions is a matter for free decision by each State; it carries with it the legal obligation to apply ratified Conventions through domestic law, and to submit to supervision by the appropriate ILO bodies, in accordance with established procedures, in order to ensure the application of the obligations undertaken. Recommendations, which often complement Conventions, on the other hand, are guidelines for national legislation and practice. They are not subject to ratification and cannot give rise to substantive legal obligations.

17. The International Labour Conference, as the legislative body of the ILO, adopts Conventions and Recommendations. Selected subjects are placed on the agenda of the Conference by decision either of the Governing Body of the International Labour Office (article 14, paragraph 1, of the Constitution) or of the Conference itself (article 16, paragraph 3). The decisions of the Governing Body are based on studies prepared by the Office, a technical committee or experts. The technical preparation that precedes and accompanies the framing of ILO standards is the best possible guarantee that an international instrument will only be adopted once its subject-matter has reached a sufficient degree of maturity. By the time they come into being, ILO standards have already achieved a high degree of consensus, partly because they need a two-thirds majority to be adopted by the Conference, and also because government, employers' and workers' delegates participate actively in the work. The preparatory work is published for governments, employers and workers to consult, so that they can form an opinion about the bearing of the provisions.
2.2 Prospects

18. Since 1919, 174 Conventions and 181 Recommendations have been adopted by the International Labour Conference. A question which sometimes arises is whether the ILO has not exhausted its role as legislator and should perhaps suspend or abandon it. The question has become more pressing, particularly with the increase in structural adjustment programmes and growing tendency to deregulate the labour market. In recent years, however, inequalities between States and within States have not only persisted but have very often widened. That is why, in order to maintain the cohesion of the international community as well as that within States, it is necessary to use instruments of universal character aiming at the promotion of social justice, namely the standards adopted by the ILO. In this regard, it should be stressed that if the framing of standards had been suspended in recent years, there would not have been a number of important instruments such as the ones on vocational rehabilitation and employment (1983), occupational health services (1985), seafarers' social security (1987), indigenous and tribal peoples (1989), protection of workers' claims in the event of the insolvency of their employer (1992) and the prevention of major industrial accidents (1993). In the view of the present Committee, to suspend the framing of new standards would be to deprive the ILO of one of its most effective means of maintaining the pace of progress and social dialogue.

19. For some years the ILO has also focused its efforts on reviewing and updating standards which are no longer suited to reality. These efforts should be pursued. In addition, consideration should be given to revising a number of recent Conventions that have not been ratified, despite their relevance, because certain provisions are considered too inflexible and certain requirements too demanding. The general surveys produced by the Committee of Experts could be a useful reference for revising and updating standards.

20. It must be remembered that ILO instruments, whether new or revised, set minimum standards (article 19, paragraph 8, of the Constitution). As a matter of principle, Conventions should set a general framework. The desire for flexibility in the framing of international labour Conventions has been reflected in the Constitution since 1919, and has prompted many of the flexibility clauses to be found in Conventions (for example the possibility of opting for one or several parts of a Convention or of choosing between different techniques of protection and application). Wherever possible such clauses should be included in new instruments and others drawn up, as required. In addition, more detailed provisions can be included in Recommendations accompanying Conventions.

21. Implementation of certain ILO standards can have direct repercussions on national economic policy as well as on individual enterprises. This is true, for example, of standards on social security or paid leave. In framing such standards, it is important to bear in mind their economic impact so that cost does not become a disincentive to ratification. This does not apply to
standards on fundamental human rights which must be observed regardless of economic circumstances or fluctuations.

22. Certain provisions of Conventions and Recommendations adopted recently have been criticized in some quarters for their lack of clarity and coherence. This cannot but affect ratification, and in any event gives rise to problems when it comes to application. While the Conference is the legislative body of the Organization, the Office is without doubt partly responsible for this state of affairs, although it may only make proposals. It would be helpful if members of the standard-setting technical committees of the Conference showed awareness of the demands of their legislative work by ensuring that the texts that are finally adopted are as coherent and clear as possible.

23. The gestation period for a Convention or Recommendation is rarely less than five years from the time when the subject is chosen. The advantage of this long gestation period is that by the time the standards are adopted they have achieved a high degree of maturation and international consensus. The disadvantage is that the ILO's legislative procedure cannot always cope with new situations which might call for rapid intervention. So, consideration should be given to using more flexible formulas such as resolutions or codes of conduct, even if it means resuming the regular procedure later.

3. Supervision of the application of standards

3.1 The present situation

24. From the beginning, the ILO Constitution established that there should be regular monitoring of the application of ratified Conventions by means of an annual report from governments (article 22 of the Constitution). It also provided for ad hoc supervision in the event of representations (articles 24 and 25) or complaints (articles 26-29, and 31-34) being submitted to the Office. In addition, it established a procedure for supervising non-ratified Conventions and Recommendations (article 19, paragraphs 5(e) and 6(d)).

25. The ILO's regular supervision procedures have been of decisive importance. The capacity to keep pace with a constantly changing environment is one of the features of the supervisory machinery. International labour Conventions have been adopted since the First Session of the International Labour Conference in 1919. Within a few years the growing number of ratifications increased the flow of annual reports. It became clear that the plenary of the Conference could no longer cope with all the reports itself. As the number of reports grew it would eventually have had to spend all its time on them to the detriment of the framing of standards and its other tasks. Besides, the legal problems raised by the application of Conventions were becoming more complex, so a technical supervisory body was needed which could examine the reports from a legal standpoint and remain uninfluenced by group interests - which would inevitably have surfaced in the Conference because of its tripartite composition. This was how the first change came about in the supervisory machinery: by a resolution adopted in 1926 the Conference decided to set up a Committee on the Application of the
Conventions and Recommendations of the Conference (hereafter referred to as the Conference Committee on Standards) and a Committee of Experts on the Application of Conventions and Recommendations. The members of the latter are appointed not by governments, but by the Governing Body on the Director-General's proposal, and it is responsible, with technical support from the International Labour Standards Department, for examining, from a legal standpoint, governments' reports and any observations made by employers' and workers' organizations. The Committee of Experts' most important comments, called "observations", are published and submitted to the Conference, which transmits them to its Committee on the Application of Standards. They are examined by that Committee with the participation of the governments concerned and of delegates from national organizations of employers and workers.

26. As the years went by it became the practice, considered by some as a tradition not to be tampered with, for the Committee on the Application of Standards to deal only with cases already examined by the Committee of Experts. The Conference Committee has never operated as a review or appeals body vis-à-vis the Committee of Experts. The two bodies have different functions: the Committee of Experts is responsible for technical supervision, whereas the Conference Committee, which is tripartite, provides an opportunity for direct dialogue between governments, employers and workers, and can even mobilize international public opinion.

27. Neither of the supervisory bodies may impose sanctions of any kind, though their conclusions are sometimes regarded as political or moral sanctions. The two supervisory bodies complement each other effectively: the Committee of Experts conducts a technical and impartial examination of the cases and the Conference Committee - whose conclusions are submitted to the plenary sitting of the Conference - contributes the political weight and influence of an international forum in which governments, employers and workers may speak freely.

28. Besides the regular supervisory procedure, based on the examination of governments' reports, the ILO Constitution provides for two other procedures. Under the representation procedure, an employers' or workers' organization may submit allegations of failure by a Member of the Organization to adopt satisfactory measures, within its legal system, for the application of a Convention to which it is a party. If the representation meets the formal requirements of receivability, (Endnote 2) it is sent to the government concerned and the case is submitted for examination by a tripartite committee set up for the purpose within the Governing Body, whose conclusions and recommendations may be published.

29. The complaints procedure is more elaborate than the representation procedure in terms of the rules of the Constitution that govern it. Under this procedure any member State of the ILO may file a complaint to the Office against another Member which, in its opinion, has not adopted the necessary measures to give proper effect to a Convention ratified by both Members. This procedure provides all the guarantees of a regular procedure. It should be
pointed out that the complaints procedure may also be initiated by the Governing Body of its own motion, or by a delegate to the Conference.

30. Complaints are referred to commissions of inquiry appointed specifically for each case and composed of independent persons of international repute. The conclusions and recommendations of the commissions are published in the ILO Official Bulletin and may be challenged before the International Court of Justice whose ruling is final. If a Member fails within the prescribed time-limit to give effect to the recommendations of the commission of inquiry or the decision of the International Court of Justice, the Governing Body may recommend to the Conference any measures it deems necessary to ensure that the recommendations are observed. The government against which the complaint is filed may at any time inform the Governing Body that it has taken the necessary measures to implement the recommendations of the commission of inquiry or the Court's decision. In practice, no economic or other sanctions have been applied in the context of this procedure.

31. The procedure laid down in article 19(5)(e) and (6)(d) of the Constitution is not a supervisory one in the strict sense, since it is concerned with the action taken by member States in respect of unratified Conventions and of Recommendations. In practice, however, the General Surveys made each year under article 19 by the Committee of Experts on instruments selected by the Governing Body contain an analysis of domestic laws and comments by the Committee of Experts on their consistency with the instruments in question. These surveys have continued to grow in importance. Today they serve as a reference for the whole standards supervision system.

32. The above procedures were laid down in the Constitution in 1919. Since the Second World War, two other supervisory procedures have been introduced, one for freedom of association and the other for equal treatment. These procedures are based on the universal values and principles set forth in the preamble to the Constitution and in the Philadelphia Declaration (incorporated in the Constitution).

33. The special procedure for complaints concerning freedom of association was established in 1950 by an agreement between the United Nations Economic and Social Council (ECOSOC) and the ILO. The most original feature of this procedure is the fact that the receivability of a complaint is not necessarily linked to the ratification of the relevant Conventions by the State in question, but rests on the fundamental principles deriving from the Constitution. One of the supervisory bodies which intervene in this procedure is the Fact-Finding and Conciliation Commission on Freedom of Association, a standing commission set up by the Governing Body along the lines of the commission of inquiry provided for in article 26 of the Constitution. A tripartite committee (Committee on Freedom of Association) was also set up within the Governing Body initially for the purpose of determining which complaints should be submitted to the Fact-Finding and Conciliation Commission. The latter was to have been the centre of gravity of the procedure. But events ruled otherwise. Under the new procedure the government against which the complaint was lodged was to give its consent for the case to be submitted to
the Commission. However, as States were reluctant to give their consent, the scope of action of the Committee on Freedom of Association gradually broadened, particularly in cases where an urgent decision was needed. Today, the Committee is undeniably the real centre of gravity of this special procedure.

34. A procedure for equal treatment issues was established in 1973. It enables the Director-General to undertake special studies on issues of discrimination in employment on grounds of race, religion, national extraction, social origin, membership of a minority, or sex. The government brought to task has to give its prior consent. This special procedure has never been used.

35. Although it is not strictly speaking a supervisory procedure, mention should also be made of the direct contacts procedure officially inaugurated in 1968, on the basis of a series of principles established by the Committee of Experts and approved by the Conference Committee on the Application of Standards. (Endnote 3) Its purpose is to enable a representative of the Director-General to examine with the government concerned how to overcome any difficulties in applying a ratified Convention or observing constitutional obligations regarding standards, or any obstacles in the way of ratification. The government must make a request for direct contacts. In the case of ratified Conventions, the information gathered by the Director-General's representative is sent to the Committee of Experts. This procedure is frequently used; it has enabled serious discrepancies noted by the supervisory bodies to be overcome. Direct contacts have also been used frequently and successfully in the context of the freedom of association procedure. In this context, such direct contracts could bring about further development, especially if governments concerned adopt a more open attitude.

3.2 Prospects

36. The ILO's supervisory system has earned wide international recognition for its efficiency, but it could be further improved. A general question which arises in this context is whether the present supervisory machinery should not be opened up to individuals, which is not now the case. If individuals had access to redress on matters concerning ratified Conventions or fundamental principles whose content lends itself to such a procedure (for example, freedom of association, equal treatment or freedom of work), the field of action of the ILO's supervisory system would certainly be broadened. Before such a decision were taken, however, an assessment would have to be made of the human and financial resources needed to deal with such cases properly, taking account, in particular, of the universal nature of the ILO and the potential for conflicts in the social sector. As things now stand, it seems that opening up the system to individuals cannot be envisaged; besides, they can transmit their comments on the application of ratified Conventions through organizations of employers and workers, which are entitled to present their observations for the consideration of the supervisory bodies.
37. Another question which is being asked with increasing frequency is what compensation could be envisaged for persons or bodies adversely affected by the failure to apply Conventions or the principles laid down in the ILO Constitution. Some of the supervisory bodies, particularly the Committee on Freedom of Association, have already recommended such compensation. It is a matter that requires further discussion.

38. Generally speaking, it can be said that the regular supervisory procedure, based on article 22 of the Constitution, has on the whole given satisfaction and that it should continue to be at the core of the ILO's system of supervision. But certain adjustments have been necessary: the growing number of ratifications, in itself a clear sign that member States approve of the ILO's standard-setting activities, has led to a state of saturation both in the supervisory bodies and in the national administrations responsible for preparing reports. The Governing Body adopted proposals on this issue at its November 1993 Session. (Endnote 4) It also decided to bring forward the date of the Committee of Experts' annual meeting to December which, amongst other things, will enable the Committee's report to be published earlier. These adjustments will take effect in 1995 and should make the procedure more efficient at no extra cost.

39. The division of functions between the Committee of Experts and the Conference Committee on Standards has been one of the keys to the success of the ILO's supervisory system in that the complementary nature of the independent examination carried out by the Committee of Experts and the tripartite examination of the Conference Committee on Standards makes it possible to maintain a desirable balance in the treatment of cases. In the present Committee's view, communication and dialogue between the two committees should be improved. With this in mind, the Conference Committee on Standards invited the Chairman of the Committee of Experts to attend its general discussion as an observer in June 1993. The initiative proved to be most satisfactory and the invitation has been renewed for 1994. This is an important step towards improving the dialogue between the two supervisory bodies.

40. The constitutional representation and complaint procedures have, on the whole, been satisfactory. But, bearing in mind that procedures of commissions of inquiry in some cases lack flexibility, it may be necessary to give consideration to other procedures less expensive and more flexible.

41. The success of the procedure for complaints to the Committee on Freedom of Association of the Governing Body contrasts with what has to be called the failure of the procedure of special studies on equal treatment. It could be that the success of the former is largely due to the tripartite nature of that Committee, the competence of its members, its relatively stable membership and the regularity of its meetings (three times a year). In addition, it is flexible and expeditious and costs relatively little. The Committee on Freedom of Association has succeeded in reconciling dynamism and efficiency while maintaining the guarantees of a regular procedure. However, discrimination in employment, which is becoming increasingly topical owing to
growing discrimination on grounds of sex and ethnic origin, still lacks special protection of the kind that exists for freedom of association. The same could be said of forced labour. According to the present Committee, one might envisage setting up a procedure which would deal more effectively with cases of discrimination, forced labour and child labour.

42. Because of their nature, the existing supervisory procedures do have the disadvantage that they are not always able to respond with the speed and flexibility needed to overcome serious discrepancies in the application of ratified Conventions, with the one notable exception of direct contacts. Other mechanisms such as permanent access to mediation and voluntary arbitration proposed by the Director-General in his Report to the Conference, (Endnote 5) could be envisaged to complete the panoply of ILO procedures. If such mechanisms were introduced, it would be necessary to ensure that the coherence and unity of the supervisory system were preserved in all cases and, in particular, that the new mechanisms dovetailed with existing procedures.

4. More active participation in the supervisory system

4.1 The participation of national administrations

43. At government level, supervision of the application of standards should not be an exercise between only one ministry and the supervisory bodies and their secretariat. The preparation of the reports required under article 22 of the Constitution very often involves several services or even several ministerial departments. The obligation to report should not be regarded as a merely formal obligation, but more as a means for governments to take stock periodically of the state of their labour legislation using instruments that they have ratified voluntarily as a gauge. The recent adjustments in the reporting procedure (Endnote 6) could be an opportunity for member States to consider anew the scope of this international obligation and its usefulness for the country.

44. The preparation of reports increasingly requires close cooperation between the various government bodies not only because the instruments adopted are becoming more technical but also because responsibility for their implementation is shared more widely. Clear and well-documented reports are a major prerequisite for constructive dialogue with the supervisory bodies. The main responsibility in the supervision lies with governments. It is also governments that have to decide what is to be done with the information collected for preparing the reports required under articles 19, 22 and 35 of the Constitution or, more generally, how to invest the time and work that goes into preparing the reports.

45. In this regard, the Committee would give a few examples of how the information collected in preparation for reports can be put to broader use. In certain cases, it has been considered useful to send the report to the parliamentary committee responsible for social issues, particularly when the application of a Convention raises legislative problems. In other cases, inter-
ministerial bodies have been set up to prepare the reports, either on a permanent basis, or on an ad hoc basis if the supervisory bodies have noted serious difficulties. Standard-setting would benefit if all those responsible at national level were more closely involved in the supervision process. Broadening the use made of the information has a dual purpose: to improve the application of international labour standards, particularly ratified Conventions, by those responsible at national level, and to improve standard-setting activities, particularly the process for reviewing international labour standards, by obtaining a broader range of opinions on their relevance or the conditions for their application.

4.2 The participation of employers' and workers' organizations

46. The need for more participants at the report preparation stage in the dialogue on the application of standards led the Governing Body in 1932 to decide, on the proposal of the supervisory bodies, that the report forms on ratified Conventions should ask whether the government concerned had received comments from employers' and workers' organizations. (Endnote 7) The question covers all employers' and workers' organizations concerned: national central confederations, branch federations, regional or local organizations, enterprise unions, and international employers' and workers' organizations (confederations or occupational federations).

47. In addition to the right to comment on the application of ratified Conventions, certain organizations were given the right, as of 1948, to receive a copy of the report submitted by the government under article 23(2) of the Constitution which states: "Each Member shall communicate to the representative organizations recognized for the purpose of article 3 copies of the information and reports communicated to the Director-General in pursuance of articles 19 and 22."

48. The Committee has examined in detail the arrangements for the participation of employers' and workers' organizations and made proposals to improve them. (Endnote 8) The adjustments made to the procedure by the Governing Body at its 258th Session (November 1993) will mean greater involvement of employers' and workers' organizations; this, in turn, will require an additional effort on the part of the Office to assist those organizations in understanding ILO standards (particularly the conditions for their application in law and practice) and procedures. Such an effort would round off the activities to strengthen employers' and workers' organizations, or even contribute to establishing them where they do not yet exist. Priority should be given to measures to broaden their autonomy and make them more representative.

49. The Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144), is an appropriate instrument for involving employers' and workers' organizations more closely in standard-setting activities. The present Committee believes that promoting ratification of this instrument should be a priority of the International Labour Office.
50. Progress in the organization of consultations, beginning with discussions at the national level, could help solve a number of problems encountered in applying standards. Successful consultations of this kind would avoid referral of such problems to an international body before an attempt has been made to solve them internally. In its last examination of this matter, the Committee none the less recalled that consultation does not necessarily mean agreement and that, in certain cases, despite consultations, divergences have persisted and comments have been sent to the appropriate international bodies.

51. Cooperation seems to be emerging between organizations of employers and workers and non-governmental international organizations dealing with the protection and promotion of human rights; the former sometimes communicate through the Director-General information they have received from the latter concerning the application of Conventions in the context of the procedures referred to above. So there could well be new developments in the participation of non-governmental international organizations other than employers’ and workers’ in supervisory activities. There is already participation of this kind in the context of the procedure in article 26 of the Constitution; the commissions of inquiry ask non-governmental organizations to pass on any available relevant information.

5. Promotion of standards and technical cooperation

52. In the past few years the Committee has been following with great interest the different steps being taken to ensure complementarity between standard-setting activities and technical cooperation. Some of the proposals on the subject have been examined by the Governing Body (Endnote 9) and the Conference itself in the general discussion on technical cooperation. (Endnote 10) Although most of the questions raised on those occasions are outside the Committee's terms of reference, it none the less intends to lend its support to any measures taken in the context of technical cooperation to improve the application of international labour standards.

53. In the present Committee's view, technical assistance and promotion of ILO standards should continue to receive the greatest possible attention in the future. This is an area where much remains to be done. However, if emphasis is placed on these activities - which in practical terms means devoting greater financial and human resources to them - it should on no account be to the detriment of the efficiency of the supervisory system, which must remain high on the list of priorities.

54. In contributing to the discussion on developments in international labour standards and particularly developments in the supervisory system and its future, the intent of the Committee was to provide a recapitulation of the present as a starting point from which to advance successfully towards the future. What matters is not so much to take stock of the past but to prepare for the future in a world which sometimes tends to forget that without freedom, democracy and social justice mankind is almost certainly doomed. Human beings must be returned to the core of the ethical, political, economic and social concerns of the international community, which should take account of
the situations of the poorest and most vulnerable. The International Labour Organization still has an immense task to accomplish. It is to be hoped that the foregoing reflections will help it to remain faithful to the ideals that witnessed its birth and execute even more effectively the social mandate conferred on it by the international community. The Committee, for its part intends, within the framework of the mandate assigned to it, to pursue its action in the light of the Philadelphia Declaration to ensure that all human beings, regardless of their race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity.

Endnote 1

Preamble of the Constitution of the International Labour Organization.

Endnote 2

Doc. GB.212/205, para. 64.

Endnote 3

See ILC, 63rd Session, 1977, Report III(4A), para. 38 "Principles governing the procedure of direct contacts".

Endnote 4

Document GB.258/6/19. See also para. 113 below.

Endnote 5

ILC, 81st Session, 1994, Report I(1) "Defending values, promoting change", p. 53.

Endnote 6

GB.258/6/19.

Endnote 7

GB.259/6/19.

Endnote 8

Endnote 9

Governing Body, 252nd Session (February-March 1992), GB.252/15/1, "International labour standards and technical cooperation".

Endnote 10