



## Governing Body

310th Session, Geneva, March 2011

GB.310/6

**FOR DECISION**

### SIXTH ITEM ON THE AGENDA

## **Complaint concerning the observance by Myanmar of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), made by delegates to the 99th Session (June 2010) of the International Labour Conference under article 26 of the Constitution of the ILO**

### Overview

#### **Issue covered**

This document sets out the Government's reply to the article 26 complaint and follows up on the request from the Governing Body in November 2010 to put this matter again before it at its March 2011 session.

#### **Policy implications**

Depending on the decision taken.

#### **Financial implications**

Depending on the decision taken. The cost of a Commission of Inquiry would need to be approved by the PFAC.

#### **Decision required**

Paragraph 7.

#### **References to other Governing Body documents**

Governing Body members may find reference to document GB.310/8, paragraphs 106–112, useful in their consideration of this paper.



1. At its 309th Session (November 2010), the Governing Body had before it a report by its Officers<sup>1</sup> regarding a complaint concerning the observance by Myanmar of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), made by some Workers' delegates to the 99th Session (2010) of the International Labour Conference. The complainants allege that, despite consistent attempts by the Conference Committee on the Application of Standards to create a constructive dialogue with the Government of Myanmar to find durable solutions to the very serious violations of the Convention, the Government has persistently failed to ensure its effective implementation. They add that grave violations of freedom of association continue, irrespective of the Government's pledge to hold elections, and the impact that these are to have on bringing about democracy in the country. There is no legal framework to ensure freedom of association and, in practice, trade unionists are severely persecuted, including through the violation of their basic civil liberties. The Federation of Trade Unions of Burma (FTUB), a legitimate trade union organization, is still banned. The complainants add that the Government has made no commitment to ensuring full freedom of association, including the possibility of pluralism.
2. The Governing Body took the following decisions on the complaint:
  - (a) that the Government of Myanmar be requested by the Director-General to communicate its observations on the complaint so as to reach him not later than 31 January 2011;
  - (b) that the Government of Myanmar be invited to send a representative to take part in the proceedings of the Governing Body concerning this matter at its future sessions, in accordance with article 26, paragraph 5, of the Constitution. When so inviting the Government of Myanmar, the Director-General should inform it that the Governing Body intends to continue its discussion of this case at its 310th Session, which is to take place in Geneva in March 2011; and
  - (c) that the decision on whether the complaint should be referred as a whole to a Commission of Inquiry, in accordance with article 26, paragraph 4, of the Constitution, be postponed to a later stage, in the light of the information provided to the Governing Body in connection with the complaint.
3. By a letter dated 26 November 2010, the Director-General informed the Government of Myanmar of the decisions mentioned above.
4. By a letter dated 18 January 2011, the Permanent Mission of the Union of Myanmar in Geneva transmitted the observations of the Government of Myanmar on the complaint. The document is appended to the present report. The Government recalls the legislative history of its country with respect to trade union rights and recognizes that the Trade Unions Act of 1926 has not been applied since 1964, nor could any registrar be appointed to fulfil the vital role of registering organizations. Workers' organizations were, however, formed and existed until 1988 under the Law prescribing the Fundamental Rights and Responsibilities of People Workers. While there have been no workers' organizations since that time, workers' rights have been protected under existing legislation. In addition, workers have been able to negotiate directly with the employer in the presence of a government representative so as to create the necessary environment for industrial peace. A stop-gap measure was undertaken to allow associations of workers at the industry level and enable the election of workers' representatives to the International Labour Conference. The newly adopted Constitution of 2008 provides for the right to form associations and organizations. A trade union law in line with Convention No. 87 is being drafted. The

<sup>1</sup> GB.309/7.

formation of workers' organizations will proceed after the law's enactment and technical assistance would be requested if necessary. An ILO presence in Myanmar to cover such matters is still not required. The draft trade union law will be submitted to the legislative body and enacted in accordance with the democratic system. The Government further provides explanations as to the purpose of Orders Nos 2/88 and 6/88, as well as the Unlawful Association Act. It indicates the reasons for the imprisonment of persons whose release has been called for by the Governing Body, clarifying that they were not arrested for the exercise of their basic civil liberties or freedom of association rights. The Government adds that they are all in good health, provided with necessary medical treatment, ensured their rights of defence and receive visits from their families. The Government further refers to the authority to grant amnesties or suspend sentences and observes that those who conduct themselves well in prison will have opportunities for their sentences to be suspended or could be released occasionally. As regards the call for recognition of the FTUB, the Government reiterates that workers' organizations must be formed under domestic law and respect the law of the land. Members of the FTUB have been declared as terrorists under the sovereign right of the nation. The Government highlights the importance of the multi-party democratic general elections recently held in the country. In conclusion, the Government reaffirms its commitment to respecting Convention No. 87 and cooperating with the ILO which, it observes, is further demonstrated by the fact that it has not denounced the Convention. It expresses its intention to discuss the draft trade union law with the ILO mission in February 2011 and to provide information on the progress made in a timely manner.

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5. A high-level mission, led by Mr Guy Ryder, Executive Director for Standards and Fundamental Principles and Rights at Work, visited the country from 22 to 25 February 2011 to sign the renewal of the Supplementary Understanding. This was an opportunity to offer further advice in relation to the legislation that the Government announced was being drafted to provide for the rights under Convention No. 87 (see the report of the Liaison Officer under agenda item 5).<sup>2</sup> During a session attended by relevant actors from the Ministry of Labour and Employment, the Attorney-General's Office and the Supreme Court, the Government presented a draft labour organizations law, upon which the ILO mission was able to make initial comments and engage in further brief discussion. While the mission was not provided with a copy of the draft or requested to provide more substantial and detailed observations on matters relevant to the application of Convention No. 87, it did reiterate on a number of occasions that the ILO remained fully available to the Government to provide more extensive remarks within the framework of a full and meaningful consultation. The Government stated that it had consulted the Union of Myanmar Federation of Chambers of Commerce and Industry (UMFCCI) on the draft legislation, which would be presented to Parliament at its second or third session and would be in full conformity with Convention No. 87.
6. Further information in relation to the follow-up given to the recommendations made by the Committee on Freedom of Association in Cases Nos 2268 and 2591 against the Government of Myanmar is set out in the introduction to the Committee's 359th Report submitted to the Governing Body for approval at its current session.<sup>3</sup>

<sup>2</sup> GB.310/5.

<sup>3</sup> GB.310/8, paras 106–112.

*7. The Governing Body may wish to consider whether, in the light of the information available, it wishes to institute the procedure provided for in article 26, paragraph 4, of the Constitution and consequently to proceed to appoint a Commission of Inquiry to consider the allegations referred to in paragraph 1 above.*

Geneva, 10 March 2011

*Point for decision:* Paragraph 7



## Appendix

### **Observations of the Government of Myanmar regarding the conclusions of the 309th Session of the ILO Governing Body on the complaint from some Workers' delegates led by Mr Leroy Trotman from Barbados against the Government of Myanmar for non-observance of ILO Convention No. 87**

#### **1. Introduction**

Eight Workers' delegates led by Mr Leroy Trotman from Barbados lodged a complaint against the Government of Myanmar for non-observance of ILO Convention No. 87 to the ILO Director-General on 17 June 2010. The communication dated 26 November 2010 addressed to the Minister for Labour, Myanmar from ILO Director-General regarding the conclusions of the 309th Session of the ILO Governing Body was received. In this communication, the Government's observations on the complaint are requested for reply to the ILO Director-General no later than 31 January 2011. We, therefore, communicate to the ILO Director-General on the matters regarding the complaint of eight Workers' delegates.

#### **2. Allegation of the non-compliance to Convention No. 87 ratified by Myanmar**

Trade Unions Act, 1926 was practiced in Myanmar. It was being practiced after gaining her independence in 1948 as it was in conformity with the Constitution of 1947. The Trade Unions Act, 1926 was also being practiced until 1962 as it was in conformity with ILO Convention No. 87 adopted by the ILO in 1948, ratified by Myanmar on 4 March 1955. Thus, it is hereby obvious that Myanmar complied with Convention No. 87.

On 2 March 1962, when the Revolutionary Council took over State responsibilities, the organization structure of the State had been changed according to the Myanmar way to socialism, and the Revolutionary Council had enacted the Law prescribing the Fundamental Rights and Responsibilities of the People Workers in 1964. The Trade Unions Act, 1926, was included in the 1964 law as its rules. The Basic Workers' Organizations to the Central Workers' Organizations which could claim for the rights and privileges of the workers were formed, and such kind of practice existed till 1988. By that time, the Associations of Workers were formed in Myanmar to ensure the rights of the workers in the associations in accordance with the domestic law and Convention No. 87.

Existing labour laws have been stipulated as rules of the Law prescribing Fundamental Rights and Responsibilities of People Workers, 1964. Those are being exercised until now except the Trade Unions Act, 1926 after stipulating the rules. It means that the Trade Unions Act, 1926 has not been exercised since 1964; to date, over forty years, and the registrar who plays a vital role in the Trade Unions Act, 1926 could not also be appointed. Therefore, it is defunct and now could be recognized as a dead letter law. However, formation of the workers' organizations is provided in article 9, Chapter 5 of the Law prescribing Fundamental Rights and Responsibilities of People Workers, 1964. At that time, all workers from the state-owned, co-operative, private and joint venture enterprises all over the country enjoyed their rights by joining workers' organizations such as basic workers' organizations, township workers' organizations and central workers' organization, and the Workers' Organization Congress was also held annually. Those workers' organizations existed until 1988. Although there were no workers' organizations after the Tatmadaw assumed the responsibilities of the State in 1988, workers' rights are

protected under the existing labour laws. In addition, Trade Unions Law is being drafted to be in line with Convention No. 87. Therefore, it is not true that the legislation does still not provide for the right to freedom of association in Myanmar in law or practice. Because of the facts mentioned above, we would like to stress that Myanmar is not in non-compliance with Convention No. 87.

Moreover, the Government of Myanmar performed the commitment of drafting Article of Association under Trade Unions Act, for establishing the association of workers with the regulations in the stop gap before the new law was enacted. However, it was inconsistent with the present situation, and Myanmar sought to draft the law in conformity with international norms. In 2007 and 2009, the associations of workers were formed on the basis of industry with the cooperation of the Liaison Officer from the International Labour Organization as the prior activity and elected a Workers' representative to attend the International Labour Conference. The Constitution of the Republic of the Union of Myanmar 2008 has been adopted through the national referendum for the emergence of a modern, developed and democratic nation and the multiparty general election has been held successfully.

With respect to the rights of the workers, the following are prescribed in Chapter VIII, Section 354 of the Constitution of the Republic of the Union of Myanmar, 2008 such as:

Every citizen shall be at liberty in the exercise of the following rights, is not contrary to the laws, enacted for Union security, prevalence of law and order, community peace and tranquillity as public order and morality:

- (a) to express and publish freely their convictions and opinions;
- (b) to assemble peacefully without arms and holding procession;
- (c) to form associations and organizations;

and these show the State's political will.

In the conclusion of the 99th Session of the International Labour Conference, in the expression of the Committee of Experts, "The intrinsic link between freedom of association and democracy". In this matter, with the occurrence of a new democratic nation in Myanmar, the Legislative Drafting Committee shall submit the Trade Unions Law (draft) to *Pyithu Hluttaw* and the *Hluttaw* representatives shall discuss the draft thoroughly and then the Trade Unions Law shall be enacted in accordance with the democratic system.

The discussion on the Trade Unions Law (draft) with the Experts of the ILO Mission that visited Myanmar in January 2010 and the amendments are being reviewed by the team led by the Attorney-General and so the draft law is ready to be submitted to the legislative body in the new democratic nation.

- (a) To repeal Orders Nos 2/88 and 6/88, as well as the Unlawful Association Act, so that they could not be applied in a manner that would infringe upon rights of workers' and employers' organizations

Order No. 2/88 was issued to ensure prevalence of law and order, community peace and tranquillity, to secure smooth communications and travel, and to uplift prosperity and welfare for the people. Order No. 6/88 was proclaimed to safeguard and invigorate the prevalence of law and order, community peace and tranquillity through the Formation of Associations and Organizations Law. In Myanmar there are numerous organizations which have endeavoured infallibly and unerringly in order to promote stability and development of the State and the people. These guilds and associations have been structured freely without constraint and restriction. The Trade Unions Law (draft) prescribes that all workers except Tatmadaw personnel, members of the Myanmar police force or armed

forces under the control of the Tatmadaw have the right to join freely workers' organizations of their own will.

It is observed that the specific law or general law is enacted as the fundamental law (*Locus Standii*) of the procedure of forming the specific association or general association according to the types of associations in every nation. Consequently, the associations shall perform systematically with the purpose of the association in that nation. No one shall deny that every nation requires having law and order and the law for public administration is enacted with its sovereign right. The Unlawful Association Act was stipulated in order to protect from violence of illegal armed forces. The Unlawful Association Act provided that "unlawful association" means an association; (a) which encourages or aids persons to commit acts of violence or intimidation or of which the members habitually commit such acts, or (b) which has been declared to be unlawful by the President of the Union under the hereby conferred. These orders and the Unlawful Association Act are the laws of public administration of the nation and the laws protecting the danger of threatening the peace and stability of the nation under the sovereign right for the prevalence of law and order.

(b) To release all persons detained for exercising their basic civil liberties and freedom of association rights

The following persons who were detained are asked to be released. In reality, they were imprisoned as they broke criminal procedures, and actions taken against them were not related with labour affairs. Their current situations are as follows:

1. Thurein Aung broke criminal procedures and has been placed at Kyauk Phyu prison. His spouse, Ma Moe Moe Hlaing and his elder sister, Ma Sandar Aung, visit him regularly. He is in good health.
2. Nyi Nyi Zaw breached criminal procedures, and has been placed in Kyaingtong prison. His mother, Daw Aye Aye Nyo visits him on a regular basis and he is in good health.
3. Way Lyin, who breached criminal procedures, has been placed at Putao prison. His father U Myo Min Maung visits him regularly, and he is in good health.
4. Kyaw Kyaw, who breached criminal procedures, has been placed at Kalay prison. His mother, Daw Htay Myint and his elder sister Ma Cho Pyone, visit him and he is in good health.
5. Kyaw Min (a) Wanna breached criminal procedures, has been placed in Buthitaung prison. He is in good health.
6. Myo Min who breached criminal procedures, has been placed at Kauthaung prison. He receives regular family visit from his elder sister, Daw Yi Yi Win and he is in good health.
7. Su Su Nway (a) Nwe Nwe Win is serving her prison term at Khandee prison as she violated existing criminal laws. She has the opportunity to meet her elder sister, Daw Htay Htay Kyi at prison and she visits to her regularly. Su Su Nway is in good health. She often breaches the rules and regulations of prison. During her trial, she had the benefit of all legal rights such as right of defence, right to produce evidence supporting her defence. The Court found her guilty by means of sound evidence. In addition, she stated by herself that she would accept the verdict of the Court. Thus, the Court adjudicated her case in accord with sound evidence and existing laws.
8. Lay Lay Mon (a) Ma War breached criminal procedures, has been placed at Shwebo prison. Her elder sister, Daw Thida San Maung visits her, and she is in good health.
9. Myo Aung Thant who breached criminal procedures, has been placed at Myitkyina prison. His mother, Daw Than Htwe and younger brother, U Ye Min Thein visit him.

He was provided medical treatment for hypertension and piles, but at present he is in good health.

10. Tin Hla has been placed at Insein Central prison concerning Arms Act, and he is in good health.

Thurein Aung, Wai Lin, Nyi Nyi Zaw, Kyaw Kyaw, Kyaw Min and Myo Min were not workers and never worked in any factories and establishments. In Myanmar, there are a number of organizations which have been formed for the purpose of the State and public interests and those organizations have the right to assemble peacefully, to hold processions, to hold march-rallies and to deliver public lectures. Similarly, thousands of workers demand their rights individually or collectively according to the laws. For example, in February 2010, workers from Weng Hong Hunt garment, Opal garment and Taiyi shoes factory, employing about 1,700 workers in each, in Hlaingthayar Township, Yangon, demanded their rights and such kind of demands were resolved by the tripartism comprising of the representatives of government, workers and employers. No worker was hindered or sanctioned by the State for the purpose of their demands. Therefore there is no one detained for exercising their basic civil liberties and freedom of association rights.

Western District Court, Yangon, tried the said cases and allowed the accused following legal rights under existing laws:

- to defence with lawyer;
- to make cross-examination;
- to present supporting witnesses; and
- to appeal to higher Courts.

Therefore, the Court adjudicated their cases in accordance with laws. In fact, they are not trade unionists but they are persons conflicting with existing criminal laws. Since 1988, the Government has granted general amnesty four times and has suspended their sentences 11 times in accordance with code of criminal procedure 401(1), and 114,950 prisoners have been released. At present the persons who are well-conducted in prisons will have opportunities to be suspended or released occasionally.

- (c) To accept an extension of the ILO presence to cover the matters relating to Convention No. 87

Rights of the citizens including freedom of expression, to assemble peacefully, freedom of association are guaranteed in the Chapter VIII of the Constitution of the Republic of the Union of Myanmar, 2008. Moreover, the legislative body would emerge from the democratic government as the results of the election held on 7 November 2010, and it has been already informed that the Legislative Drafting Committee shall submit the drafted legislation to the *Pyithu Hluttaw* and the representatives of the *Hluttaw* shall discuss on the draft thoroughly. The formation of the workers' organizations will proceed after enacting the law, and technical assistance would be requested if necessary. ILO presence to cover the matters relating to Convention No. 87 in Myanmar, therefore, does still not require.

### **3. Accusation regarding the election**

In the process of transforming Myanmar into a democratic State according to the new Constitution approved by the people, the multiparty democracy general election was held successfully on 7 November 2010. That was the fifth step of the seven-step political roadmap and also a very important one.

In the elections, 3,069 candidates contested for a total of 1,154 seats at *Pyithu Hluttaw*, *Amyotha Hluttaw*, and State/Division *Hluttaws* (including national races). Candidates from 37 political parties and independent candidates contested and 22 million eligible voters cast their votes; 77.26 per cent of the voters cast their votes for *Pyithu Hluttaw* seats, 76.78 per cent of the voters cast their votes for *Amyotha Hluttaw* seats and 76.62 per cent of the voters cast their votes for State/Division *Hluttaws* seats.

On the day of the election, foreign diplomats, members of the press from Myanmar and foreign news agencies, and editors and reporters from the local journals and magazines visited the polling stations in states and divisions and had the opportunity to see for themselves how the people were casting their ballots freely and systematically. They also had the opportunity to witness the counting of ballots before the public by polling booth officials after the closure of polling stations.

The Union Election Commission has declared the result of the elections in daily newspaper. The Union Election Commission issued Notification No. 143/2010 announcing the results and statistics regarding the elections. The notification, Appendix I, is attached herewith.

Anyone who wants to make a complaint regarding the elections can do so by reporting to the Union Election Commission within 60 days in accordance with Election Rules and Laws. So far, it is learnt that 15 complaints to the Union Election Commission and 49 complaints to the Myanmar Police Force have been reported.

It is undeniable truth that the multiparty democracy general elections in the Union of Myanmar have been completed peacefully and successfully without any disturbances. The ASEAN, its member countries, India, China and some other countries, welcomed the successful holding of the elections and issued statements recognizing the elections as an important step in the democratization process of Myanmar.

#### **4. *The legislation does still not provide for the right to freedom of association in Myanmar in law or practice***

There are no grievances for all workers in Myanmar to enjoy their rights although the Trade Unions Act, 1926, is a dead letter law. The workers are fully provided to enjoy their rights under the existing labour laws which are being administered by the Ministry of Labour. Moreover, we have a regard to Convention No. 144, the Tripartite Consultation Convention, 1976, in practice. The tripartite consultation in Myanmar is such a kind of practice that 10 to 50 Workers' delegates elected among the workers by themselves of their own will from concerned factories and establishments negotiate directly with the employer before the Government representative to reach conclusions. There has been industrial peace in Myanmar because of such kind of practices. The ILO Liaison Officer in Myanmar has already known such kind of systematic practices. In addition, Myanmar Overseas Seafarers Association (MOSA) has been established to protect Myanmar seafarers for enjoying their rights and privileges and has also been affiliating with the other overseas seafarer unions, and the Union of Myanmar Federation of Chambers of Commerce and Industry (UMFCCI) and other employers' organizations have also been established in Myanmar freely and independently.

The statistics of trade dispute cases and workmen compensation cases which have been resolved during the recent years are as follows:

Period	Disputes cases	Compensation cases
2005	328	38
2006	418	43
2007	411	54
2008	365	38
2009	475	22
2010	672	24

Rights of the citizens such as freedom of expression, right to assemble peacefully, and freedom of association are guaranteed in the Chapter VIII of the Constitution of the Republic of the Union of Myanmar, 2008. Moreover, the legislative body would emerge from the democratic government as the results of the election held on 7 November 2010, and it has been already informed that the Legislative Body shall submit the drafted legislation to the *Pyithu Hluttaw* and the representatives of the *Hluttaw* shall discuss the draft thoroughly. The formation of the workers' organizations will proceed after enacting the law and technical assistance would be requested if necessary.

**5. *Persecution of trade unionists remains of a very serious nature involving murder, torture and continued imprisonment of those trying to organize or defend workers' interests***

Action was taken against some individuals for their destructive acts to State peace and stability and prevalence of law and order and breaching of existing law. Any government shall take action against whoever disturbed stability of the State and peace and prevalence of law and order for the public interests. The said persons act as workers themselves or labour activists for having protection to be free from action taken against them for breaching existing law. Asking for releasing of such persons seems to encroach on prevalence of law and order. No workers were persecuted during the period of the Tatmadaw Government for their activities on labour affairs.

There are a number of organizations which have been formed for the purpose of the State and public interests and those organizations have the right to assemble peacefully, holding processions, holding march-rallies and delivering public lectures. Similarly, thousands of workers demand their rights individually or collectively. According to the statistics, the number of workers engaged in collective acts during the last four years are as follows:

Period	No. of factories/ establishments	No. of workers
2007	88	34 885
2008	63	28 419
2009	45	14 325
2010	134	50 325

In those processes, any worker was not hindered or detained or persecuted by the State for their collective acts. Therefore, there is no one who was tortured and detained for trying to organize or defend workers' interests.

**6. To recognize FTUB and all other trade unions including operating in exile as a legitimate trade union organization**

With respect of the recognition of trade unions including FTUB, if it is required to form an association in Myanmar, there shall be *Locus Standii* under Myanmar Legal System; the said associations of the Workers shall respect law of the land under Article VIII of Convention No. 87. At present, FTUB expresses “exile” and is not an association formed under the domestic law. Moreover, the members of FTUB do not abide the domestic law and because of their committing the mass loss of the people’s lives and property, they are declared as “terrorists” under sovereign right of the nation, hence, FTUB is declared an “unlawful association” under the Unlawful Association Act. Therefore, the Government of Myanmar could not recognize FTUB and the associated organizations for they are not lawfully formed, do not abide the domestic law and commit the mass loss of the people’s lives and property. Such terrorists are prohibited according to the International Convention for the Suppression of Terrorist Bombing and International Convention for the Suppression of the Financing of Terrorism, and FTUB has been declared as a terrorist organization on April 1 2006 under the Notification No. 1/2006 of the Ministry of Home Affairs. Moreover, FTUB was complained as a terrorist organization to the International Anti-Terrorist Organizations, Interpol and to Counter Terrorism Executive Directorate (CTED).

However, with emergence of the Trade Unions Law, the workers shall have the rights to form the association and to participate in it.

**7. Allegation on assassination attempts of trade union leaders was uncovered in Thailand**

The trade union leaders who referred in the complaint are not the members of any legal organization formed under the existing laws in Myanmar, and such incident did not happen in the territory of Myanmar sovereignty. If it occurred in the other State’s territory, they should take legal protection as they have the right to lodge a complaint to the concerned State.

**8. Conclusion**

Among ten ASEAN member countries, only four ASEAN members including Myanmar have ratified Convention No. 87. Myanmar has been complying with Convention No. 87 with the obligation of the member state. After 1988, Myanmar had a chance to denounce Convention No. 87 two times including a one-year interval of this time starting from 4 June 2010. However, we have not denounced the Convention and it surely goes to show the purpose to cooperate with ILO with the political will to implement Convention No. 87 successfully.

It has a plan to discuss the Trade Unions Law (draft) with the ILO Mission this year. Moreover, experts’ advice and expertise would be taken regarding Convention No. 87 if necessary and progress of law will be communicated to your Office in a timely manner.